No. 14770

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIRPORTS, INC., a Corporation, PETER A. BANCROFT and VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY,

Appellees,

and

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY, CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C. FINN, and INTERNATIONAL AIRPORTS, INC.,

Appellees.

ANSWERING BRIEF OF APPELLEE INTERNATIONAL AIRPORTS, INC.

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ANSWERING BRIEF OF APPELLEE INTERNATIONAL AIRPORTS, INC.

Statement of Pleadings and Jurisdiction.

This litigation revolves about a certain war surplus aircraft, identified as a C-46A Curtiss Commando, bearing United States Army Serial No. 42-3645, Civil Aeronautics Administration (hereinafter sometimes referred to as "CAA") registration No. N 111H (hereinafter sometimes referred to as the "plane" or the "aircraft in suit").

The jurisdictional statement by Appellant United States of America (hereinafter referred to as "the Government") in its brief is substantially correct.[1] Adding thereto, it appears that in its amended complaint the Gov-

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[1]Page references to the Government's brief are designated "(G. .....)."

ernment claimed to be the owner of the plane and entitled to its immediate possession. The Government alleged four counts: Declaratory relief (28 U. S. C., Secs. 1345, 2201, 2202); damages for breach of contract as against Appellee Vineland Elementary School District of Kern County (hereinafter sometimes referred to as "Vineland"); damages for inducing breach of contract as against Vineland's superintendent, Appellee Peter A. Bancroft, and Appellees Charles C. Finn and George C. Finn (hereinafter sometimes referred to as "the Finns"); and for claim and delivery [Calif. Code Civ. Proc., Secs. 509-521; Fed. Rules Civ. Proc., Rule 64]. The interest of Appellee International Airports, Inc., a corporation (hereinafter sometimes referred to as "International"), in the plane arises by virtue of an aircraft lien [Calif. Code. Civ. Proc., Sec. 1208.61, *et seq.*] on the plane for labor and materials of the stipulated value of $10,200 [R. 633-634],[2] and a chattel mortgage to secure a loan to the Finns of $15,000 in cash. Seaboard Surety Company, a corporation, originally named as a co-defendant in the action, filed a disclaimer of all interest and was eliminated from further proceedings [R. 123, 124].

The Finns filed a counterclaim against the Government, the merits of which will be touched upon below only in so far as certain statements made by the Government in its discussion thereof affect the rights of International.

Statement of the Case.

The background of this case commenced to unfold in 1944. On October 3 of that year the 78th Congress enacted Public Law 456, entitled "Surplus Property Act of 1944," 58 Stat. 770. In Section 2 thereof Congress set forth its declared objectives.[3] Under Section 9(a) of the

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[2]References to the printed record are designated "[R. .....]."

[3]These objectives, together with certain other provisions of the Act are recited in Appendix B, G. 81, 82.

Act, Congress expressly directed that the formulation of regulations shall "be guided by the objectives of this Act."

The Surplus Property Board administered the foregoing Act until September 18, 1945 (59 Stat. 533); the Surplus Property Administration took over until March 25, 1946 (Executive Order No. 9707, 11 F. R. 3149), when the War Assets Administration (WAA) became constituted. WAA administered the Act until June 30, 1949 (63 Stat. 381).

Pursuant to the authority of said Surplus Property Act, the Surplus Property Board promulgated its Regulation No. 4 governing the disposal of surplus aircraft, components and parts. This regulation became effective May 4, 1945 (10 F. R. 5460), and was amended upon three separate occasions, first, by the Board, and later by its successor agencies. At a later point[4] we shall set forth and analyze the changes effected in Regulation 4 by these amendments, in so far as they bear upon certain of the questions presented in this appeal. It is enough here to state some of the pertinent provisions of Regulation 4 as it stood in July, 1946, when the Government disposed of the aircraft in suit. The applicable regulation became effective May 21, 1946 (11 F. R. 5868; 32 C. F. R. 1946 Supp. 8304.1 *et seq.*).[5]

Section 8304.11 of Regulation 4 governed disposals of aircraft for educational purposes. To make such disposals, it was required that the disposal agency first determine that the "surplus aeronautical property" intended for disposal be "commercially unsaleable." The Regulation defined "aeronautical property" broadly, by words which included complete transport type aircraft [Sec. 8304.1(b)(1)]. "Commercially unsaleable property" was

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[4]*Infra,* p. 24.

[5]The text of this Regulation is largely set forth in Appendix B, G. 89-95.

defined as property which has no reasonable prospect of sale at or above a minimum price established by the disposal agency, or where such minimum price has not been established, no reasonable prospect of sale except as salvage or scrap [Sec. 8304.1(b)(2)].

By the same Regulation 4 "Transport aircraft" were those which are "designed to perform or can economically be converted to perform the commercial transportation of persons or property or both" [Sec. 8304.1(b)(10)]. From the evidence [*e.g.,* Vineland's Ex. "F"] if not from common knowledge, it is undisputed that the aircraft in suit is a "transport aircraft," within the meaning of the Regulation.

Under Section 8304.7, the disposal of transport aircraft was to be made upon a consideration of various factors affecting such property. The Section concluded:

> "The disposal agencies shall attempt, whenever practicable, to dispose of surplus transport type aircraft by sale rather than by lease. Transport aircraft of models approved by the Administrator, may, however, be leased by the disposal agency upon the terms approved by the Administrator; *Provided, however, That after June 30, 1946, transport aircraft shall be disposed of only by sale."*[6]

Turning to the economic factors present, it was publicly well known that after the war the Government had tens of thousands of aircraft of all types which were surplus to its needs and available for disposal. Thousands were destroyed to prevent them from being dumped wholesale on the commercial market. Of those that remained, the Government's problem was not to retain ownership but to get rid of it. In connection with its

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[6]Emphasis added throughout unless otherwise indicated. Vineland's payment for the disposal in question occurred July 10, 1946 [International's Ex. A]; delivery occurred July 25, 1946 [Govt. Ex. 5].

aircraft educational dsposal program, the War Assets Admnistration published a form sheet of instructions, paragraph 2 of which read as follows:

> "Distribution under this plan will be confined to aeronautical property which has been determined by the disposal agency to be *commercially unsaleable* by reason of its condition resulting from wear, tear, obsolescence, or otherwise, has *no reasonable prospect of sale* except as scrap, or with respect to which by reason of its large supply or prior use the estimated cost of care, handling and disposal will exceed the estimated proceeds unless it is promptly sold as scrap, or with respect to which the estimated cost of care, handling and disposal will exceed the estimated proceeds as scrap, or otherwise."

Quantities of these aircraft having been determined administratively to be commercially unsaleable, it is not surprising to learn that those which the Government was able to sell commercially went for $5,000,[7] or less.[8]

Against this backdrop of legal and economic conditions, here only sketched, moved the parties to the instant litigation. War Assets Administration circularized the schools, including Vineland, in the fore part of 1946. It sent Vineland a copy of its form sheet instructions (U. S.

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[7]Superintendent Bancroft testified that when he "visited the field where these aircraft were, . . . even the representatives there said, 'Well, we are glad to see one more go, because we are sure stuck with them.'" Then occurred the following:

"The Court: I had thought it was a matter of common knowledge at the time that the Government was anxious to dispose of these aircraft as surplus.

"Mr. Abbott: Unquestionably, your Honor. Unquestionably the market was depreciated because of the large stock, but they still had commercial value, and were sold commercially at certain figures." [R. 535.]

[8]George C. Finn testified that some of these aircraft were sold for $2,500 [R. 880].

Government Printing Office 16-47792-1) outlining in Instruction III "How to Purchase" [Vineland's Ex. "E"]. Vineland's Superintendent Bancroft filled out an "agreement," being WAA Form 65 [Government's Ex. 1], and a "Purchase Order," being WAA Form 66 [Vineland's Ex. "D," reproduced at App. A], both dated June 25, 1946. For the aircraft in suit and a certain AT-6 aircraft (not here involved), Vineland paid the Government $300, for which War Assets gave Vineland a "Sales Receipt," being form No. WAA-LA-12 [International's Ex. "A," reproduced at App. B], dated July 10, 1946. War Assets Administration delivered the aircraft in suit to Vineland on July 25, 1946, from a field near Ontario, California [R. 228], from whence Vineland's pilot flew it to a strip near its Sunset School [R. 228] in the Bakersfield area. With the delivery, War Assets Administration gave Vineland a "Release of Custody of Aircraft" document, being a form No. SWPD-DP 1316 [Government's Ex. 4] upon which Vineland receipted for the plane in a space marked "Purchaser."

Upon receiving the plane, Vineland used it as a classroom for over four and one-half years.[9] Finally, in December, 1950, the Finns offered to purchase it, and their negotiations ripened into a purchase and sale of the plane

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[9]In this connection, Superintendent Bancroft testified that "[u]pon receiving the aircraft, we immediately put it into use as a classroom. The students started to work on it, cleaning it up. It was very dirty after being stored in the open for a number of years, and some of the first things we did was, as I say, to clean it up. It was our firm intention never to fly it again. This was to be a classroom, and it was only of value to us as such. So we filled the gasoline tanks with water, we filled the tires with water, dug holes in the ground in the spot it was to be put in, we built concrete piers to try to save the tires from deteriorating completely by resting the wheel structures on them. We tore out bulkheads and installed forced air coolers of the type we use in the desert air country up there, and disconnected the mags. So that the engines were all completely disconnected, and the plane would be safe, as well as non-usable as a flight instrument." [R. 512.]

on February 28, 1951[10] [Finding No. 3, R. 150]. The sale was effected by a written agreement between these parties of the same date [Vineland's Ex. "B"].

On April 14, 1951, Vineland delivered to the Finns a Civil Aeronautics Administration form bill of sale (Form ACA-500) for the plane [International's Ex. "A," reproduced at App. C]. This was recorded with Civil Aeronautics Administration in Washington, D. C., on April 16, 1951, upon which date the Administrator of Civil Aeronautics assigned to the aircraft the civil registry No. N 111H, and issued to the Finns an aircraft registration certificate reciting them as owners of the plane [International's Ex. "A"; Findings Nos. 4 and 7, R. 150-151].

After their purchase the Finns, assisted by a certificated airplane and engine mechanic, accomplished considerable repairs and replacements upon the plane to make it flyable [R. 272-276]. An expert witness called by the Government testified that this work added $5,000 to the value of the plane [R. 289], which already had risen in value to $20,000 or $25,000 because of demand generated by the Korean War.[11]

But flyability alone in an aircraft of this type is not enough. Its use in commercial air transportation requires that it be licensed by CAA according to the standards

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[10]Superintendent Bancroft testified that "[t]he reason that the previous offers were turned down was that, basically, as you can see by the film, we had a classroom, very functional and popular with the students, and we wished to keep it. And until the final offer by the Finns, nobody had shown us how we could still keep a classroom there, and by offering the old airplane, which they, in the contract, agreed to completely set up so in all appearances it would be the same as the plane in suit, no one had ever done that before, and that is why we weren't interested."

[11]This testimony by witness Douglas Duly was as follows:

"Q. What was there, from the value you placed on them at that time to the value that you placed on them in 1951, that changed their value up to the $20,000 or $25,000 figure? A. Supply and demand. This was a transport airplane, and the Korean war was in effect, and, nautrally, airplanes were scarce, and the value went up.

of that agency [R. 649]. The work and replacement parts required for such licensing, if the aircraft is intended for pasenger use, costs approximately $45,000 [R. 957]. To accomplish such licensing, the Finns entered into an agreement therefor on August 31, 1951, with International, an aircraft repair concern at Burbank, California [International's Ex. "E"]. Pursuant thereto International loaned the sum of $15,000 in cash to the Finns, for which the Finns executed and delivered to International a promissory note secured by a chattel mortgage on the plane [International's Exs. "C" and "B," respectively]. At the same time and as part of the same transaction, the Finns and International entered into a written lease of the plane for a term of eighteen months commencing upon completion of the work [International's Ex. "G"]. The chattel mortgage was recorded by CAA on November 14, 1951 [Finding No. 8, R. 152].

Next, the Finns made the plane ready for flight.[12] Ac-

Although no work was done on the airplane, the actual value went up.

"The Court: When, in your opinion, did the airplane in question here come to be worth more than $5,000, substantially more than $5,000? At the outbreak of the Korean war?

"The Witness: No, it took, I believe six months to generate interest in that type airplane." [R. 301.]

[12]George C. Finn testified that in approximately September, 1951, "[w]e had inspected the fuel system and we had gone over the airplane to see just what parts were required, and we were picking up parts wherever we could find them during that interim until we could get ready to rehabilitate this airplane. * * * [T]here was a list that we went by for putting it in top flying shape, which was designated by the Civil Aeronautics Administration. We went through that list as a further necessary requirement, and then we knew from our own experience, in just examining the plane, that we were going to have to change the carburetors and the plugs, and these engines had not run, and we were going to have to do a lot of work to get this airplane in shape. It was sunk in the ground, with the tires deflated and worn and rotted and unusable, and we knew we were going to have to take all the rusted and deteriorated parts off and replace them, because the CAA would not let us fly it until it reached a certain technical requirement." [R. 406.]

complishing this, they flew it to Lockheed Air Terminal, Burbank, where they delivered it to International [Finding No. 9, R. 152]. The plane remained in International's possession until May 25, 1952, during which time International bestowed labor and materials for its repair and improvement. The reasonable value thereof was stipulated to be $10,200 [R. 634]. For this amount International claimed an aircraft lien under applicable California statutes [Finding No. 9, R. 152].

Although the advisory jury empanelled by the trial court found that International had "knowledge or notice" of the claims of the Government and Vineland when International loaned the money and did the work above, it also found that International acted in these maters "in good faith (believing) that defendants Finn were the true and lawful owners of the airplane in suit . . ." [R. 113, 114]. Upon its consideration of the entire record, the trial court found as a fact that [R. 152]:

> "10. Said loan was made and said labor and materials were bestowed by Defendant International in the ordinary course of its business believing in good faith that Defendants Finn were the true and lawful owners of the aircraft."

As stated by the Government in its opening brief (G. 11), differences between International and the Finns resulted in litigation in the courts of the State of California. A summary of that litigation, and the judgment, is reported in *International Airports, Inc. v. Charles C. Finn, et al.*, 132 Cal. App. 2d 293. Although International did not have a final judgment in that litigation at the time of the trial below, the judgment therein pronounced is now final.

The District Judge in the instant case, taking note of the prior jurisdiction which had attached therein by the State Court, declined to relitigate in this case the issues there presented, since such was "not essential to a deci-

sion of the other claims at bar" [R. 131]. By its judgment the trial court herein resolved the Government's claims adversely to it. The same judgment further resolved against Vineland the claims it asserted against the plane, although reserving to Vineland any claims it may have against the Finns. Finally, the trial court gave judgment to the Finns on their counterclaim against the Government [R. 159-162]. From the judgment so entered, both the Government and Vineland appeal. The questions raised by both appellants in their respective opening briefs will be answered in this brief.

Questions Presented.

I.

DID THE GOVERNMENT'S DISPOSAL OF THE AIRCRAFT IN SUIT IN 1946 PASS FULL TITLE TO VINELAND? The District Court answered the question "Yes." International contends that it should be answered "Yes."

A. The documents show a plain intent to transfer title, and such transfer was authorized by law.

B. The WAA Form 65 restrictions did not prevent title passing.

1. The restrictions are contradictory to those contained in Regulation 4, Section 8304.11(c) (32 C. F. R. 1946 Supp.), and invalid.

2. The restrictions are contrary to the provisions and objective of the Surplus Property Act of 1944 (58 Stat. 766, 50 U. S. C. App., Sec. 1611), and invalid.

3. There is no estoppel to assert invalidity of the restrictions.

4. The restrictions are merely contractual in effect, giving rise to an action for damages, if any, for their breach.

II.

DID VINELAND'S DISPOSAL OF THE AIRCRAFT IN 1951 PASS FULL TITLE TO THE FINNS? The District Court answered this question "Yes." International contends that it should be answered "Yes."

A. The documents show a plain intent to transfer title.

B. Vineland's transfer was authorized by law.

III.

AS A BONA FIDE PURCHASER (ENCUMBRANCER, ACCESSOR), IS INTERNATIONAL ENTITLED TO PRIOR RIGHTS IN THE PLANE? Although finding as a fact that International acted in good faith, the District Court was not required to reach this question. International contends that it should be answered "Yes."

A. International was a bona fide purchaser

1. Under the Act
2. Apart from the Act.

B. As against International, the Government is estopped to deny that it passed title to Vineland.

C. As against International, Vineland is estopped to deny that it passed title to the Finns.

D. International has a valid recorded aircraft chattel mortgage.

E. International has a valid aircraft lien.

F. International has prior rights by accession.

ARGUMENT.

I.

The Government's Disposal of the Aircraft in Suit in 1946 Passed Full Title to Vineland.

A. The Documents Show a Plain Intent to Transfer Title and Such Transfer Was Authorized by Law.

The aircraft in suit admittedly was disposed of under the Surplus Property Act of 1944, as amended (58 Stat. 765), and Regulation 4 (32 C. F. R. Supp. 1946, Sec. 8304.1 *et seq.*) governing aircraft disposal.

Under the statute, disposal for educational use may be only by sale or lease (Sec. 13(a)(1)(A)). That section provides in part that:

> "Surplus property that is appropriate for school, classroom or other educational use may be *sold or leased* to the States and their political subdivisions and instrumentalities . . ."

The intention of Congress is further emphasized in House Report No. 1890, 78th Congress, 2nd session, page 25:

> "The conference agreement (Sec. 13) retains the provision of the House bill with respect to the donation of property having no commercial value. This is the only case in which donation is authorized. The conference agreement further provides that the Board shall prescribe regulations for the disposition of surplus property to States and their political subdivisions and instrumentalities, and to nonprofit institutions, and shall determine on the basis of need what transfers are to be made. In formulating such regulations the board is to be guided by the objectives of the act and to give effect to the following policies to the extent feasible in the public interest:
>
> "(1) Surplus property appropriate for educational use may be *sold or leased* to the States and their political subdivisions and to tax supported institutions,

as well as to certain other nonprofit educational institutionals.

* * * * * * * *

"(3) In fixing the *sale or lease* value of property to be disposed of in each of the above cases, the Board is directed to take into consideration any benefit which has accrued or may accrue to the Uinted States from the use of such property by any State, political subdivision, instrumentality or institution."

The Government's quotation of only a part of the above paragraph (3) in its brief (G. 40, footnote 28) fails to give the court the benefit of the full meaning therein expressed. Said paragraph is carried into the Act almost verbatim (Sec. 13(a)(1)(C)).

Other methods of disposition are written into the Act, but we believe that they are inapplicable here. Section 15(a) provides in part:

"Notwithstanding the provisions of any other law but *subject to the provisions of this Act,* whenever any Government agency is authorized to dispose of property under this Act, then the agency may dispose of such property by sale, exchange, lease, or transfer, for cash credit, or other property, with or without warranty, and upon such other terms and conditions as the agency deems proper. . . ."

Thus Section 15 is expressly subject to the other provisions of the Act, including Section 13. Section 13 is entitled "Disposal to local governments and nonprofit institutions." As we have seen, it specifies its own methods of disposal: *sale or lease.* Moreover, Section 13 relates only to "surplus property" as defined by the Act (Sec. 3(4). Section 15 relates to any "property" as defined by the Act, meaning "property of any kind" (with certain exceptions) (Sec. 3(d)). Section 15 deals with disposal by any Government agency, and follows a section dealing with disposition by any "owning agency." Sec-

tion 13 and Regulation 4 deals with disposal by the "disposal agency," a much more limited term (see Secs. 3(a), (b) and (c)).

It is a well established rule of statutory construction that specific provisions govern general provisions (cases collected in 59 Fed. Dig. 194). Accordingly, we submit that Section 15 has no place in this action. And since there is no contention that the Vineland transaction was a *lease,* it could only be valid as a sale under Section 13.

Moreover, the Regulations required a sale of the airplane in suit. Section 8304.7, as we have seen,[13] provided in part that *"after June 30, 1946, transport aircraft shall be disposed of only by sale."* We have also established that the sales receipt for the aircraft in suit bears date July 10, 1946 [International's Ex. "A"], and that N 111H is a transport aircraft [R. 301].

In its brief (G. 38, footnote 27) the Government argues that Section 8304.7 "has no bearing on the instant transaction," but relates instead to disposals into commercial channels. Nothing in said section compels such conclusion. Both Section 8304.7 and its companion section, 8304.6, deal with methods of disposal for the particular type aircraft each deals with. Section 8304.6 deals with and is entitled "Disposal of tactical aircraft." Section 8304.7 deals with and is entitled "Disposal of transport aircraft." Both "tactical aircraft" and "transport aircraft" are embraced in the more comprehensive term "aeronautical property," as defined in Section 8304.1(b)(1), and used in Section 8304.11(a) dealing with educational disposals. Significantly, Section 8304.6 *expressly* considers the educational market, among others, in arriving at its determination.[14] Is it then wrong to as-

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[13] *Infra,* p. 4.

[14] "Sec. 8304.6. *Disposal of tactical aircraft.* (a) Aside from a relatively small demand for tactical aircraft to serve specialized industrial, *educational* and private uses, there is no significant market for aeronautical property of this class." (G. 91.)

sume that the same framers had in mind the educational market, among others, when they formulated Section 8304.7? We think not. And when this section tells the disposal agencies "That after June 30, 1946, transport aircraft shall be disposed of only by sale," this mandate on its face and by application applies to *all* transport aircraft, including the aircraft in suit.

Nor is there anything inconsistent with this mandate in Section 8304.11. The Government claims there is, because Section 8304.11 "carefully uses the term 'disposal' and 'to dispose' rather than the terms 'sale' or 'to sell'" (G. 38). *This proves nothing.* The term "disposal" is used throughout Regulation 4, witness Sections 8304.2, 8304.4, 8304.6, 8304.7, 8304.8, 8304.9, 8304.10, 8304.11, 8304.14, 8304.15, 8304.17, 8304.54 (see G. 89-95). In fact there is hardly a provision in Regulation No. 4 that does not speak of "disposal" of surplus property whether it be a sale, lease, or other transfer. Further contrary to the Government's said claim, Section 8304.11 *does* contain other indicative words, *i.e.,* "prices," "resold," and "date of purchase," which are consistent only with the concept of a sale. This is but right, since Section 8304.11 exists under Section 13(a)(1)(A) of the Act, authorizing only "sale or lease." Subsection (b) of Section 8304.11 provides:

> "The disposal agency shall establish procedures pursuant to which educational . . . institutions or instrumentalities may make written application for surplus aeronautical property available for disposal to such institutions or instrumentalities. Such procedures shall include (1) a certification that the applicant is an educational . . . institution or instrumentality as defined in Sec. 8304.1, (2) a certification of the purposes for which the property is to be acquired, and in the case of aircraft an agreement that it will not be flown except for purposes of research or experiment in connection with the

science of aeronautics, and (3) *an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency* unless it is mu*l*tilated or otherwise rendered unfit for use except as scrap."

How could the property *ever* be resold if it never was sold in the first place?

The Government stresses the fact that transfer of the airplane was under its Exhibit 1, the WAA Form 65 agreement. We shall have more to say about this agreement at a later point, but for purposes of this discussion it is entirely inaccurate to consider or even intimate that Exhibit 1 is a transfer document of any kind. It exists by virtue of Section 8304.11(b) of Regulation 4. Yet that section nowhere provides for such a document as a *transfer document,* only as a "written application" which *shall include* "an agreement that the property will not be resold to others within three (3) years . . ."

Plaintiff's Exhibit 1 itself bears out the fact that it is not a "transfer document." It recites that:

> "In consideration of the transfer of certain items of Aeronautical Property, under provisions of Surplus Property Act of 1944, Public Law 457 Vineland Elementary School District located at Rt. 6, Box. 207, Bakersfield, Calif., hereby certifies and agrees as follows:"

Thus the transfer is wholly independent of the agreement. It is not even subject to the agreement. It is the *consideration for the agreement.* It is the *quid;* the agreement is the *quo.* Further, note the use of the word "transfer." This word itself has a commonly accepted legal significance, as follows:

> (1) Bouvier (1934): "The act by which the owner of a thing delivers it to another person, with

the intent of passing the rights which he has in it to the latter."

(2) Black, 4th Edition (1951): "An act of the parties or of the law by which the title to property is conveyed from one person to another. (Citations.) Alienation; Conveyance, 2 Bl. Comm. 294."

(3) Wharton (1938): "To convey; to make over to another, the document by which property, as shares in public companies, is made over by one to another."

The trial court, noting that a *transfer* was intended, saw no reason to construe it as something different from or less than precisely that [R. 344-347].

What then was the transfer document? It appears as a "sales receipt," a copy of which is part of International's Exhibit "A." The Government contends that title never passed because there was no bill of sale (G. 39). But here the Act authorized a sale, the Regulation *required* a sale and spoke in terms of a sale, and the Government's agents, purporting to obey the law, executed and delivered a "Sales Receipt," being a War Assets Administration form used to effectuate such law.

Said sales receipt recites Peter Bancroft "Purchaser or Authorized Representative," "For purchase in name of Vineland School District." It bears date July 10, 1946, and is executed in the name of War Assets Administration. We do not believe that the Government can fairly say that its sales receipt was not delivered for moneys received for a *sale*. The mere recitation of a different contention under the facts here denies the plain meaning of the words used in the instrument.

Even the "Release of Custody" document [Government's Ex. 4] upon which the Government relies (G. 39) confirms that a sale of the plane was intended, and occurred. For on its face appears: "This aircraft was sold for educational purposes only," "S/P 200.00," and a receipt for the aircraft by Vineland as the "Purchaser." "S/P" is a common abbreviation of "selling price."

The Government observes that "The district court placed considerable stress on the fact that words such as 'price,' 'sell,' 'sold,' and 'purchase' were used in the various documents, other than WAA Form 65, which described the transfer to Vineland" (G. 40-41). We ask simply, "why not?" Nothing in *Williston on Sales,* Sections 7, 8 (1948 Ed.), cited by the Government at that point, compels or even suggests that a contrary conclusion would be proper on the facts here present.

Since WAA delivered Vineland a sales receipt naming Vineland as "Purchaser" of the airplane, and had it sign a receipt for the plane on a document prepared by WAA, and upon which WAA likewise described Vineland as the "purchaser," the conclusion appears inescapable that the Government "sold" and Vineland "purchased" the plane, and that, accordingly, full title passed thereby.

Nor is the legal effect of a sale altered by the fact that Vineland paid only $200.00 for the plane, as the Government insists (G. 39). The Act required that "(i)n fixing the sale or lease value of property to be disposed of . . . the Board shall take into consideration any benefit which has accrued or *may accrue* to the United States from the use of such property by any such . . . institution" (Sec. 13(a)(1)(C)). Section 8304.1 (a) of Regulation 4 required the disposal agency to "ascertain fixed prices which will reflect" such benefit. This was done by Order No. 4 of January 31, 1946, made a part of Regulation 4, as amended.[15] The determination therein recited a price of $200.00. *That price, then, reflected the entire benefits which have accrued (in July, 1946) or may accrue to the United States.* There was no further consideration to be exacted.

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[15]As published in the Federal Register (11 F. R. 5868), the order promulgating Regulation 4 states in part: "Order 4, January 31, 1946 (11 F. R. 1471) under this part shall remain in full force and effect."

Even though the Government was able to sell some of these aircraft to private users in 1946 for $5,000, the Government received from Vineland as full consideration (1) $200 in cash, (2) past benefits (the nature of which are not spelled out in Order No. 4 but which said order administratively has found to exist), and (3) the *possibility* of future benefits from the use of the plane by Vineland (since both the Act and the Regulation both use the words "may accrue"). The value of these three items *together* was the consideration bargained for. As it turned out, the Government received a substantial benefit from item (3) above, since Vineland in fact used the plane as an aeronautical classroom for over four and one-half years.

In the case of *United States v. Jones* (CCA-9), 175 F. 2d 278, Jones bought property including about $60,000 worth of gears from War Assets Administration for $75. The Government sued to rescind. Held, for Jones. The court states:

> ". . . He paid value, the price asked. *United States v. Des Moines River Nav. & R. Co.,* 1892, 142 U. S. 510, 530, 12 S. Ct. 308, 35 L. Ed. 1099. If, in the face of this, and in the absence of fraud or venality on the part of its agents, *Hume v. United States,* 1889, 132 U. S. 406, 10 S. Ct. 134, 33 L. Ed. 393, the Government could question the transaction, the aims of the statute would be thwarted. The statute contains no limitation. And, as limitations do not run against the Government, no title would ever be secure against the Government, no title would *ever* be secure against attack.
>
> "It is inconceivable that the Congress would have subjected the purchasers, its former soldiers and independent busines men, to whom it gave preference as buyers, 50 U. S. C. A. Appendix, Sec. 1161(c, f), to such danger, unlimited in time. Mark well. The Government was not aiming to drive hard bargains

with the purchasers of this surplus property. It was not seeking to sell, at a profit, in competition with private industry, or to break even. To use Hotspur's phrasing, the Government was not 'in the way of bargain' caviling 'on the ninth part of a hair.' Rather, like him, in dealing with the property, the Government, in its largess, was willing to

" 'Give thrice so much * * *

To any well-deserving friend.'

"Shakespeare, 1 Henry IV, Act III, Sc. 1.

"Nowhere in the statement of objectives is recovery of cost or value mentioned as a basis for disposition. And when it speaks of prices at all, it refers to 'fair prices to the consumer.' 50 U. S. C. A. Appendix, Sec. 1611(m). Rightly, For the chief aim was to use the surplus property in helping the country, as a whole, pass from a war economy to a peace economy with as little dislocation and as painlessly as possible. The Government could assist in the attainment of this object by standing behind its selling agents and giving finality to certain of their written instruments by which title to property passed."

Likewise, Vineland "paid value, the price asked." We submit that Vineland and its transferees should be similarly protected.

B. The Restrictions in WAA Form 65 Did Not Prevent Title From Passing.

1. THE RESTRICTIONS ARE CONTRARY TO THE PROVISIONS AND OBJECTIVES OF REGULATION 4, SECTION 8304.11(b) (32 C. F. R. 1946 SUPP.), AND INVALID.

WAA Form 65 [Government's Ex. 1], paragraph 7, provides:

"That all acquired property when unfit for the above purpose will be sold only as scrap and then

only after it shall have been rendered completely unfit and useless except for its basic material content. Sales consummated within three (3) years of the date of acquisition must have the prior approval of the Disposal Agency."

We have seen above that Section 8304.11(b) provided in part that the disposal agency's procedures "shall include . . . (3) an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap."

A comparison of what the Regulation says that the Procedures "shall include," and what the Form 65 agreement does include immediately strikes the reader with two vital discrepancies, which may best be illustrated as follows:

Regulation 4, Section 8304.11(b)	WAA Form 65
(1) Requires an agreement which in effect would not restrict the right to resell after 3 years.	(1) Omits this entirely.
(2) Requires an agreement which in effect would permit resale *within* 3 years (and *semble, a fortiori* after 3 years) provided the material is "mutilated or otherwise rendered unfit for use except as scrap."	(2) Changes this to require that the aircraft be rendered "completely unfit and useless except for its basic material content."

"Scrap" is defined in the Regulation (Sec. 8304(1)(b)(4)) as "property that has no reasonable prospect of sale except for its basic material content." Thus an

airplane can be rendered (or *be*) unfit for use, meet the test of "scrap," and by the addition of an unusual amount of work, labor and materials, justified by special situations such as the Korean War, be rehabilitated for flight. It was found and declared to be "scrap" under the regulation, and the regulation required the agreement above stated.

Since the Regulation is most explicit in requiring that the agency's procedures shall include an agreement the terms of which are clearly set forth, we do not see how those procedures can omit this agreement and attempt to substitute another one perhaps more to the liking of some of its officials.

It is no answer to say that the Regulation merely set "minimum conditions" (G. 35). Certainly, procedures in addition to the three set forth in the Regulation could have been, and were, included, *e.g.,* paragraph 4 of WAA Form 65 relieving War Assets Administration of certain responsibility. The disposal agency could have established any number of procedures, provided that it "shall include" the three which were expressly spelled out in the Regulation. To that extent the Regulation *did* set minimum conditions. They were minimum in the sense that with respect to the matters covered, the Regulation defined and specified the sole measure of the requirement.

Gilbert & Secor v. United States, 75 U. S. 358 (1869), cited by the Government (G. 35-36) is not in point. There the Act specified that the contract price "should not exceed by ten per cent" the submitted bid price. Clearly, this left the price open under this top limit, and it was so held.

Instead, we believe to be analogous the case of *Priebe & Sons v. United States,* 332 U. S. 407 (1947). There plaintiff signed a contract with the Government to furnish dried eggs for lend-lease during the war. The contract called for delivery on a date certain, and provided liquidated damages for failure to complete performance

on time. The Government deducted such liquidated damages for a claimed default. Held, for plaintiff. Since Congress nowhere provided for liquidated damages, such a provision cannot be given effect. The provision was stricken despite the fact that Congress had authorized the agency to procure the goods "under appropriate terms and conditions."

In the instant case the "scrap warranty" clause as it appears in WAA form 65 [Government's Ex. 1] is not only unauthorized, it is in direct violation of what the regulation says the disposal agency procedures "shall include." If the Board intended the provision to be as written in WAA Form 65, then it presumably would never have written the provision as it did in Regulation 4.

In its brief (G. 32) the Government charges that the trial court by its holding "in effect overrides the consistent construction[16] of the administrative agency which issued both Regulation 4 and Form 65," that Form 65 was valid, and by "so ruling, the court below failed to follow established principles in this area." The answer to this is twofold:

First, as pointed out by the trial court, it is "the settled rule that a valid administrative regulation binds the administrator himself equally with others [United States ex rel. Accardi v. Shaughnessy, *supra,* 347 U. S. 26; Chapman v. Sheridan-Wyoming Co., 338 U. S. 621, 629 (1950); Bridges v. Wixon, 326 U. S. 135, 153 (1945); see Jeffries v. Olesen, 121 F. Supp. 463, 476, (S. D. Cal. 1954)], the same as though the provisions of the regulation were prescribed in terms by the statute.

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[16]Since paragraph 7 of Form 65 speaks of "sold" and "sales", the sale concept was the agency's *contemporaneous* construction of the word "disposal" in Section 8304.11. To this extent the district court's holding did not "override" the agency but conformed thereto.

[Atchison, T. & S. F. Ry. v. Scarlett, 300 U. S. 471, 474 (1937).]"

The second answer to the Government's contention is that the "established principles" declared in *Bowles v. Seminole Rock & Sand Co.,* 325 U. S. 410, and relied upon by the Government (G. 32) make an exception where the administrative interpretation "is plainly erroneous or inconsistent with the regulation." The District Court has held, and we believe we have already pointed out where such inconsistency exists. That there was administrative error can likewise be demonstrated.

The plain fact is as was found by the trial court: "[T]he printed Form 65 . . . did not contain the restrictions [of the current regulation], but contained instead the terminology of a superseded regulation."[17] To demonstrate this, we first set forth choronologically the development of the pertinent section[18] as follows:

(1) Regulation 4, effective May 4, 1945 (10 F. R. 5460) Section 8304.4(c):

> ". . . (c) the Buyer shall file with the Disposal Agency a certificate under oath, duly notarized that such buyer is an educational institution, as defined in Section 8304.1(e), that the property is being acquired to be used only for non-flight instructional, research or experimental purposes, that it will not be used for any flight purposes, and that the property will be disposed of only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content."

(2) Regulation 4, effective August 10, 1945 (10 F. R. 10362), Section 8304.4(c):

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[17]From opinion of the district judge [R. 113].

[18]The Government's footnote 24 cites two earlier versions, but omits the third (11 F. R. 179), which was the immediate predecessor of the current one.

". . . (c) the Buyer shall file with the Disposal Agency a certificate under oath, duly notarized that such buyer is an educational institution, as defined in Section 8304.1(e), *or a State or local government as defined in Section 8304.1(i),* that the property is being acquired to be used only for non-flight instructional, research, experimental *or memorial* purposes, that it will not be used for any flight purposes, and that the property will be disposed of only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content." (Italicized matter denotes changes.)

(3) Regulation 4, effective December 21, 1945 (11 F. R. 179), Section 8304.11(b):

"(b) *The disposal agency shall establish procedures pursuant to which educational . . . institutions or instrumentalities may make written application for surplus aeronautical property available for disposal to such institutions or instrumentalities. Such procedures shall include a certification that the applicant* is an educational . . . institution *or instrumentality* as defined in Sec. 8304.1, *a certification of the purposes for which the property is to be acquired, an argeement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap."* (Italicized matter denotes changes.)

(4) Regulation 4, effective May 21, 1946 (11 F. R. 5868), Section 8304.11(b):

"(b) The disposal agency shall establish procedures pursuant to which educational . . . institutions or instrumentalities may make written application for surplus aeronautical property available for disposal to such institutions or instrumentalities.

> Such procedures shall include *(1)* a certification that the applicant is an educational . . . institution or instrumentality as defined in Sec. 8304.1, *(2)* a certification of the purposes for which the property is to be acquired, *and in the case of aircraft an agreement that it will not be flown except for purposes of research or experiment in connection with the science of aeronautics, and (3)* an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap." (Italicized matter denoted changes.)

Thus, the first broad change in the Regulation's "scrap warranty" requirement came with the December 21, 1945 amendment. Prior to that, aircraft disposals were made under R.F.C. Form No. SWFD-DP-35, the "Form 35" agreement [*e.g.,* Finns' Ex. B]. *But when the regulation changed its "scrap warranty" requirement, the disposal form did not change.* The Form 35 agreement followed the May 4, 1945 version *verbatim; it was not even revised to accommodate the August 10, 1945 amendment.* Thus, that amendment (1) permitted a State or local government to acquire, and (2) permitted acquisition for memorial purposes; but Form 35 embodies neither change.

When the Surplus Property Board transferred the disposal functions of Reconstruction Finance Corporation to War Assets Administration, War Assets was charged with all the regulations of the Surplus Property Board, including Regulation 4. Educational disposals were then made under the WAA Form 65. But the scrap warranty provisions (par. 7) of Form 65 were nearly identical to those in the Form 35 agreement, which in turn were identical to those in the first Regulation 4 of May 4, 1945. A comparison of paragraphs 6, 7, and 8 of the two forms is illustrative:

Form 35	Form 65
"6. That the acquired property will not be used for any actual flight purposes.	"6. That the acquired property will not be used for any actual flight purposes.
"7. That all acquired property when unfit for the above purpose will be *sold* only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content.	"7. That all acquired property when unfit for the above purpose will be *sold* only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content. *Sales* consummated within three (3) years of the date of acquisition must have the prior approval of the Disposal Agency.
"8. That this Agreement shall be effective for all future transfers of Aeronautical Property under the provisions of Surplus Property Board Regulation No. 4, as amended from time to time."	"8. That this Agreement shall be effective for all future transfers of Aeronautical Property under the provisions of Surplus Property Administration Regulation No. 4, as amended from time to time."

The only change of note is the addition to Form 65 of the requirement of prior approval for sales made within three years. If this was intended as compliance with the mandate of the December 21, 1945 amendment to Regulation 4, it falls far short of it, as a comparison of the two readily shows.

Indeed, paragraph 6 of Form 65 restricting against use for flight purposes did not even reflect the May 21, 1946 amendment above to Regulation 4 which *permitted flight* for purposes of research or experiment. Can the Government in good conscience contend that these too are but minimum standards which the Surplus Property Board has promulgated by authority of the Congress, but which War Assets Administration officials purporting to act thereunder need not follow? We believe not; nor should the result be any different where the Regulation requires a change in paragraph 7 of Form 65, and that form fails to comply.

Although in a disrelated field, analogy may be found in a recent California case, *Adoption of McDonald,* 43 Cal. 2d 447. There, the Holy Family Adoption Service, a licensed agency, placed a child with petitioner and her husband under an agreement signed by both giving the agency "the right to remove the child previous to legal adoption if at any time the circumstances made it necessary to do so." The agreement was prescribed by regulations of the Department of Social Welfare, which was authorized by statute to make regulations for child placement. Petitioner's husband committed suicide, and the agency demanded return of the child. Petitioner refused, and filed a petition for adoption, which the agency contended should be denied because of its refusal to consent. The trial court granted the petition. Held, affirmed. The agreement was not binding. After analyzing the statutory language, the court states (p. 466):

> "[The Department of Social Welfare] has no power by regulation or otherwise to add to or detract from the rules for adoption prescribed in the Civil Code (citations). Thus, neither appellant [the agency], the department [of Social Welfare], the county agency [Los Angeles County Bureau of Adoptions], nor any private agency had the right by regulation or by agreement to deprive her of the

right granted her by section 226 of the Civil Code . . . The statutory provisions governing adoptions cannot be so circumvented."

We believe that on principle the same rule applies wherever an administrative agency attempts by agreement or otherwise to add to or detract from controlling law, whether that law is by statute, or by regulation as in the instant case. Vineland had a right conferred by Section 8304.11(b) of Regulation 4 to resell the aircraft in suit *free from any restriction,* after three years. If the foregoing analogy is sound, no official of War Assets Administration by Form 65 [Government's Ex. 1] or otherwise, could deprive Vineland of that right. To paraphrase the California court, "The regulatory provisions governing educational disposals cannot be so circumvented."

Further support may be found for this conclusion in the development of the "scrap warranty" clause of Regulation 4 itself. The May 4, 1945, version required a *"certificate* . . . that the property will be *disposed* of only as scrap . . . ." (Note that the Form 35 also uses the word "sold," indicating the agency's contemporaneous construction of "disposed"); the December 21, 1945 amendment required "an *agreement* that the property will not be *resold* to others within three (3) years . . . ." The May 21, 1946 amendment reincorporated the same language, emphasizing it if anything by specifically numbering it as a separate item "(3)" *in the regulation.*

A *certificate* is unilateral. An *agreement* is, of course, bilateral or multilateral. The change in use of words is striking. Does this not bind the agency to *offer* on behalf of the Government the terms which Regulation 4 says must be *agreed to?* If so, these are not minimums: they are the *only* terms permitted with respect to the subject they cover.

For the foregoing reasons, we submit that Form 65 is contrary to Regulation 4, and invalid.

2. The Restrictions Are Contrary to the Provisions and Objectives of the Surplus Property Act of 1944 (58 Stat. 766, 50 U. S. C. App. 1611), and Invalid.

As has been stated by this court,[19]

> ". . . This is not a casual statute, enacted in haste to cover an unexpected situation. The statute became effective on October 3, 1944, at a time when the tide of the War was turning. The Congress anticipated that the early end of hostilities would find many Governmental agencies in possession of property intended 'for war purposes and common defense,' and which, no longer needed, would become surplus. They, therefore, devised a comprehensive scheme for disposing of the property in a most effective manner, and in conformity with their conception of the American way of life, which they set forth in twenty avowed aims, 50 U. S. C. A. Appendix, Sec. 1611(a) to (t)."

Among these objectives are the following:

> "(b) to give maximum aid in the re-establishment of a peacetime economy of free independent private enterprise, the development of the maximum of independent operators in trade, industry, and agriculture, and to stimulate full employment; . . .
>
> "(c) to facilitate the transition . . . of individuals from wartime to peacetime employment;
>
> "(d) . . . to strengthen and preserve the competitive position of small business concerns in an economy of free enterprise;
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> * * * * * * * *

[19] *United States v. Jones* (CCA-9), 175 F. 2d 278.

"(f) to afford returning veterans an opportunity to establish themselves as proprietors of . . . business . . . enterprises;

* * * * * * * *

"(k) to foster the wide distribution of surplus commodities to consumers at fair prices;

"(l) to effect broad and equitable distribution of surplus property;

"(m) to achieve the prompt and full utilization of surplus property at fair prices to the consumer . . .

* * * * * * * *

"(o) to promote production, employment of labor, and utilization of the productive capacity . . .

"(p) to foster the development of new independent enterprise;

* * * * * * * *

"(r) to dispose of surplus property as promptly as feasible without fostering monopoly or restraint of trade, or unduly disturbing the economy, or encouraging hoarding of such property, *and to facilitate prompt redistribution of such property to consumers;*

"(s) *to dispose of surplus Government-owned transportation facilities and equipment in such manner as to promote an adequate and economical national transportation system; . . .*"

At the foot of the list is the following:

"(t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition."

In the instant case the trial court stated:

"It is seen that the stated objectives of the Act are replete with references to 'free independent private enterprise,' 'independent operators,' 'small business concerns,' 'afford[ing] returning veterans an opportunity . . . as proprietors,' and 'new en-

terprises.' Defendants Finn wanted to do these very things; their objective was to operate the airplane in suit themselves as a new and independent and free private enterprise.[20]

"The provision of subsection (2) of Regulation Sec. 8304.11(b), prohibiting flight of the airplane 'except for purposes of research or experiment' runs directly counter to the Congressional objectives expressed in the statute. Being contrary to, rather than in accordance with, 'the provisions . . . [and] objectives of this Act,' the regulatory provision in question is invalid. Comparable provisions of Form 65 are *pari ratione* invalid as well.

"Like considerations of reason and policy raise doubts also as to the validity of the limitations on disposal contained in above-quoted subsection (3) of the regulation, but it is not necessary to resolve them here. The three-year restriction on unfettered disposal having expired at the time of the sale to defendants Finn, the School District was free to sell the aircraft as such without violating the provisions of subsection (3) of the regulation."

Opposing this, the Government states (G. 23) that Section 9 of the Act "clearly authorizes the Board and the disposal agency to dispose of property in whatever manner appropriate in the circumstances presented so long as the disposal technique is not otherwise prohibited or contrary to the Act's purposes." Remembering that Section 13 governs disposals to educational institutions, and that Section 13(a)(1)(A) provides that such prop-

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[20]George C. Finn testified that "[w]e wanted to start our own airplane business, and we were very anxious to get this airplane in the air, so we spent all of our spare time outside of school hours planning our use of this airplane." And the court found as a fact that "[t]he intention of Defendants Finn in so purchasing said aircraft was to use it for commercial flight purposes and establish themselves as proprietors in a new independent enterprise in the field of air transportation." [Finding No. 6, R. 151.]

erty may be "sold or leased," Section 9 offers no comfort to the Government. For that section not only provides that "In formulating its regulations, the Board shall be guided by the objectives of the Act," but also that such regulations "may, *except as otherwise provided in this Act,* contain . . . terms and conditions under which, surplus property may be disposed of . . ." Thus it is clear that since Section 13 *does* otherwise provide, that section controls. The regulation may not replace or run counter to the methods there specified. Nor may it run counter to the objectives of the Act.

The Government goes on to assert that its Form 65 restrictions "are not only permitted but are almost compelled by the Act. Congress wanted to insure that the property would be put to its most effective use (see Section 2(a), *infra* p. 81)." In the Government's brief, Section 2(a), *infra,* page 81, refers to Section 2(a) of the Act. But this section, reciting one of the Act's objectives, provides:

> "to assure the most effective use *of such property for war purposes and the common defense.*"

Considered in context, this expresses a much more pointed intention by Congress. It is not defeated by using the plane in commercial carriage, since it is common knowledge that all commercial planes, like ships, are standby facilities in time of war.

The Government then insists that the Act's objectives 2(h), (j), (m), and (q) afford a statutory basis for prohibiting Vineland from using the plane for flight, or selling it without reducing it to its basic material content (G. 24).

We question this. There is no claim that Vineland was a speculator when it acquired the plane in 1946, or that it did so for speculative purposes (Sec. 2(h)). Its use as a classroom for over four and one-half years disproves this. Moreover, the Finns bought the plane

from Vineland in 1951 for approximately its fair market value.[21]

Nor was resale of some of these school aircraft without first smashing them to basic material content calculated to dislocate the domestic economy or international economic relations (Sec. 2(j)). It is common knowledge that most airplane manufacturers are and for several years past have been backlogged with orders for new aircraft against commercial and military demand. Even speaking as of 1946, the three-year restriction required by the regulation has a *reason,* considering aircraft conditions at that time. A restriction "for educational purposes so long as usable," as claimed by the Government (G. 24), is pure caprice so far as it is attempted to be justified by this record.

Nor are resales, such as here, calculated to do otherwise than "to achieve the prompt and full utilization of surplus property at fair prices to the consumer . . ." (Sec. 2(m)). The Form 65 restrictions, if given effect, would accomplish just the opposite. A three-year restriction required by the regulation appears to have been formulated "with due regard for the protection of free markets and competitive prices from dislocation resulting from uncontrolled dumping." An unlimited restriction, if required by WAA Form 65, is not.

Nor is there anything in the disposal to Vineland in 1946 which would give rise to "unusual or excessive profits," absent the unlimited restrictions recited in WAA Form 65. If the Government could not sell all its surplus C-46 aircraft in 1946 to commercial users for $5,000 each, as testified, there is no reason to believe that schools could have done better, at that time. Add the cost of ferrying the aircraft in suit, readying it

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[21]The Finns alleged in their counterclaim that $21,000 was paid for the plane [R. 104]. Its fair market value at that time was $20,000 [R. 150].

for classroom purposes, maintaining it for four and one-half years as here, and where is the "unusual or excessive profit"? The profit, if any, to Vineland comes not from the disposal in 1946, but from the market conditions generated by the Korean War in 1950 and general stimulation of air transportation. If the Government could retake its surplus aircraft because of this factor, no title to surplus property would *ever* be safe; all would be open to question on the possible ground that the Act had not been complied with (see *U. S. v. Jones,* CCA 9, 175 F. 2d 278).

The Government points to Section 13(a)(2) of the Act, which provides in part:

> "Surplus property shall be disposed of so as to afford * * * educational institutions * * * an opportunity to fulfill, in the public interest, *their legitimate needs.*" (Italics in G. 25.)

It says "disposals to educational institutions were to fulfill their needs alone, not the needs of others." (G. 25). We agree. But who shall determine when the school's legitimate needs for the equipment have been fulfilled, a federal agency or the school itself? In the American way, the question is self-answering. And that is just what Vineland did here in disposing of the plane to the Finns.[22]

Moreover, agency officials assume much when they contend that their restrictions, unlimited as to time, are justified because they are "more favorable" for the Government. Not only have they presumed upon the authority of Congress and the Board which Congress constituted to prescribe regulations, but their conclusion itself is not wholly free from doubt. The Board in Regu-

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[22]"Q. And assuming that Exhibit B had been complied with, then in that event would Vineland's legitimate needs for the aircraft have been fulfilled? A. (By Superintendent Bancroft): That is correct." [R. 537.]

lation 4 having considered three years sufficient to accomplish the desired purpose, it is hardly reasonable for other officials, not authorized to do so by the Act, to substitute their judgment for the Board's on that point, and seek to justify by declaring that the Government's interest would better be served if the Board had required Vineland *to destroy its airplane except for basic material content, whether its sale is within three years from date of purchase or thirty years.* If Vineland's legitimate needs had been fulfilled, it would appear that, considering the avowed objects of the Act above, the contrary was true.

The Government says that Congress did not intend all 20 of the Act's objectives to apply to each disposal (G. 26). Nor did the trial court so hold. It held merely that insofar as portions of Section 8304.11(b) of Regulation 4 contravened certain of the objectives, it was invalid. By providing that "In formulating such regulations, the Board shall be guided by the objectives of this Act," Section 9 of the Act required this result. The Government failed to show in the trial court, nor do we believe it has shown in this court, that Form 65 complies with other objectives so as to justify a different result.

The Government then argues (G. 26-27) that since the original disposal furthered the objectives of the Act, "how can it be said that a continuing restriction on the use of the property for educational purposes, including purposes of research and experiment, violates" them? Simply because under the Act the disposal is *independent* of any continuing restrictions. The original disposal and the continuing restrictions are two different things, not to be confused. A repugnant restriction does not become good merely because agency officials seek to attach it to a good disposal. It is the continuing restriction, not the original disposal, which violates the objectives of the Act, for reasons already stated.

The Government further argues that the effect of the trial court's holding is to make the restrictions valid should a school sell to nonveterans, and invalid where it sells to veterans such as the Finns. Not so. As appears from the opinion [R. 135-136] the trial court did not depend alone upon objective 2(f) of the Act, but regarded the objectives as a whole. Moreover, it cannot be denied that Section 2(f) *does* establish a policy in favor of returning veterans, well within the prerogative of Congress. One within that classification may justly complain if that policy is disregarded, while one not within the classification may not.

In its footnote 18 (G. 27) the Government says that by its contract with the Finns, Vineland was to receive a $21,000 consideration for a plane for which it paid only $200. We have already shown by testimony of one of the Government's own witnesses where at least $15,000 of this increase in value was due to stimulus of the Korean War [R. 301]. Accordingly, this is no grist for appellant's mill. The same footnote goes on to say that the Finns were to receive $5,000 per month from International on an 18 months lease, or a total of $90,000. This is an unfair statement, since it omits entirely a consideration of the investment in licensing the plane, testified to as approximately $45,000 to $46,500 [R. 957-958], as well as taxes, depreciation and the hazards inherent in the operation of the plane.

The Government next contends that the legislative history "demonstrates that Congress intended such restrictions" (G. 27-28). Its "demonstration" consists of the following:

(a) An extract from House Report No. 1890, 78th Congress, 2d session, page 25. We have earlier[23] quoted from this same extract to show that the "sale or lease"

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[23]*Supra,* p. 12.

provisions of Section 13 do *not* show an intent to require restrictions such as are contained in WAA Form 65.

(b) Later statutory enactments which recognize restrictions. It may be noted that the powers of the Federal Security Administrator under Section 203(k)(2)(A), 40 U. S. C. 484(k)(2)(A) quoted by the Government (G. 28) are

> ". . . (i) to determine and enforce compliance with the terms, conditions, reservations, and restrictions contained *in any instrument by which such transfer was made.*"

The sections following likewise refer to restrictions in the "instrument by which such transfer was made" or to "such instrument." This, then, does not include WAA Form 65 restrictions, for we have already shown that Form 65 was not a transfer document.[24] Likewise with Public Law 61, 84th Congress, 1st session (H. Rep. 3322). The Government must first establish that said Act applies to the WAA Form 65 restrictions before it can derive any solace therefrom. Admittedly, it would apply only to *valid* restrictions and the validity of the three-year resale restriction in Section 8304.11(b)(3) is not challenged.

We submit that the Government's many arguments in defense of Form 65 have failed; that the restrictions therein are contrary to the provisions and objectives of the Act, and invalid.

3. There Is No Estoppel to Assert the Invalidity of the Restrictions.

The Government assumes several facts in urging its claim to the contrary (G. 47-50). None of these assumed facts were raised by the pleadings, or found as facts by the court. Clearly, then, the question of es-

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[24] *Supra,* p. 17.

toppel or waiver, neither presented to nor considered by the lower court, will not be considered by this appeal. *City of Los Angeles v. Borax Consolidated Ltd.*, 74 F. 2d 901 (9 Cir., 1935); Aff'd 296 U. S. 10, 80 L. Ed. 9, 56 S. Ct. 23 (1935); *Zeligson v. Hartman-Blair, Inc.*, 135 F. 2d 874 (10 Cir., 1943); *Bowles v. Capitol Packing Co.*, 143 F. 2d 87 (10 Cir., 1944); *Home Ins. Co. v. Ciconett*, 179 F. 2d 892 (6 Cir., 1950).

Moreover, there is no evidence that Vineland "acquiesced in [any] administrative interpretation for more than four years" (G. 48) or that it even knew of any such interpretations for more than four years.

The Government goes on to assert that (G. 48) "Since the Finns were not bona fide purchasers, their rights are no greater than Vineland's, and they are also barred by Vineland's acceptance of the plane without protest as to the conditions and by Vineland's long period of acquiescence." We believe the Government has failed to show any bar *on the facts,* as against Vineland. If there was, it would certainly not affect International, as to which the trial court has expressly found that it acted in good faith [R. 152].

Nor is Vineland claiming both "under and against the same deed" (G. 49) when it attacks Form 65. We have already seen that Form 65 is not a deed; it is not a transfer document of any kind. It is an *application* for surplus property, in the form of which the applicant "certifies and agrees" to certain matters. No signature by a federal Government agent even appears thereon. The rule for which the Government contends, then, is entirely inapplicable.

Nor is it true that just because certain of the restrictions of Form 65 are invalid, this compels "the logical result . . . that the transfer was void, and neither Vineland nor the Finns ever acquired any interest in the plane," as urged by the Government (G. 49). The

position of Vineland and the Finns, as well as that of International, is expressly protected by the Act. Section 25 provides:

> "A deed, bill of sale, lease, or other instrument executed by or on behalf of any Government agency purporting to transfer title or any other interest in property under this Act shall be conclusive evidence of compliance with the provisions of this Act insofar as title or other interest of any bona fide purchasers for value, or lessees, as the case may be, is concerned."

In *United States v. Jones* (CCA 9), 175 F. 2d 278, this court stated:

> ". . . because the various agencies of the Government, in carrying on the war, could not, in their acquisition of property, be guided by ordinary peacetime considerations of economy or thrift, *Cf. United States v. Bethlehem Steel Corp.,* 1942, 315 U. S. 289, 305-309, 62 S. Ct. 581, 86 L. Ed. 855, but, of necessity, had to anticipate unforeseen events—the property of which they found themselves possessed at the time, was of unusual quantity and value. In seeking to dispose of it promptly, the Government sought to be fair with those who bought and gave them the guaranty that, once the negotiations for disposition of any of the property have been transmuted into a formal deed, lease or other instrument in writing, it was conclusive evidence of compliance with the provisions of the statute and of title. And they provided that the purchaser for value or lessee, not, as is usually done in statutes of this character—innocent third parties, into whose hands property may go, but *the very parties with whom the agencies dealt and to whom the instruments were made out,* should be protected if they paid value. No other condition was attached."

Again, the Government implies that the disposal agency may not have transferred this plane to Vineland without Form 65, so to invalidate it now would usurp administrative authority. To uphold such a theory would in effect give the agency *carte blanche* to write its own ticket. As observed by the trial judge, "a valid administrative regulation binds the administrator himself equally with others (citing cases)." [R. 134].

We submit that this is a complete answer to the Government's said claim. There is no legal or factual basis for an estoppel as against Vineland or the Finns, and certainly none as against International.

4. The Restrictions Are Merely Contractual in Effect, Giving Rise to an Action for Damages, if Any, for Their Breach.

We believe that we have shown that title passed by the Vineland transaction, and cumulatively, that the Form 65 unlimited restriction is invalid. Assuming but not conceding the contrary, what is the remedy for its breach, if any, by Vineland? An answer to this question requires analysis of the positions of each appellee.

As the warrantor, Vineland is the only party who could be held for breach of the scrap warranty, and the remedy would only be in damages.

Thus in *United States v. Newbury Mfg. Co.,* 36 Fed. Supp. 602 (D. Mass. Jan. 16, 1941) defendant bought merchandise from the Government by agreement which provided:

> "The purchaser agrees to dispose of the property covered by this contract for export to foreign countries only, and that it shall not be offered for sale for use in, nor be permitted to reach the local markets within the continental limits of the United States . . ."

The Government instituted several suits upon a trust theory against shareholders who received salaries and dividends out of profits from sales in violation of the agreement. Those defendants moved to dismiss, held, granted. The sale passed full title. Even a partial failure of consideration does not give rise to a constructive trust. A breach of contract, however deliberate, does not become a tortious wrong. Nor is the corporate defendant liable for profits upon any trust theory.

Full discussion is not attempted herein as to possible measure of damages since we do not believe International is connected with any such phase of the case. However, if California Civil Code, Section 1789(6) applies, the measure would be the Government's "loss directly and naturally resulting in the ordinary course of events from the breach of warranty." The Government's loss from Vineland's failure to reduce the airplane to its basic material content where no right to the proceeds is reserved, would appear to be only nominal.

In its effort to recover the plane the Government suggests that WAA Form 65 gave rise to a bailment, a trust, or a determinable fee (G. 42). On their face these legal concepts are incompatible, each with the others. Therefore, it is apparent that by the suggestion of all three the Government recognizes the insecurity of its position with respect to each.

The transaction was not a bailment. As seen, Section 13(a)(1)(A) of the Act authorized a *sale or lease.* The word "bailment" is nowhere to be seen. Yet a bailment as such is not an uncommon form, it having been used many times by the Government in lending tools and machinery to contractors to perform Government contracts. Only it was not contemplated by the Surplus Property Act, else it would be named therein.

The Government claims the leasing permitted by the Act authorizes bailments. First of all, this overlooks

Section 8304.7 of Regulation 4 which, as we have seen, requires that after June 30, 1946, transport aircraft shall be disposed of only by sale. Secondly, the word "lease" as applied to personal property does not generally refer to the relationship of bailor and bailee. This depends entirely on the nature of the transaction and the intention of the parties. See 8 C. J. S., Bailments, p. 226. Furthermore, it is of the very essence of a contract of bailment that it shall contemplate the return of the property bailed. See 8 C. J. S., Bailments, pp. 225, 303; Black's Law Dictionary, p. 184 (3d Ed.); 2 Kent, Comm. 559; *Zetterstrom v. Thomas,* 92 Conn. 702, 104 Atl. 237, 1 A. L. R. 392; *Samples v. Geary,* 292 S. W. 1066, 1067; *Tashima v. People,* 48 Colo. 98, 144 Pac. 200, 201. Even the case of *Commissioner v. San Carlos Mining Co.,* 63 F. 2d 153, cited by the Government (G. 43) so holds. There is nothing contained in WAA Form 65 or in War Assets Regulation No. 4 which provides for the return of the surplus aircraft to the Government, even after it might no longer be suitable for use for educational purposes. Although Vineland could, of course, offer the aircraft back to the Government, it was not required to do so by the terms of the WAA Form 65.

Viewing the transaction in the context of the law and the sales receipt [International's Ex. "A"] which War Assets Administration gave Vineland, we submit that there was no bailment.

Nor was the transaction a trust. A trust relationship was not contemplated in any disposition of surplus property under the Act, Regulation 4, WAA Form 65, Vineland's purchase order on a War Assets Administration-supplied form [Vineland's Ex. "D"], or the sales receipt [International's Ex. "A"]. The sales receipt appears as the transfer document, and it is unqualified as a sale. Authority to sell, even to sell or lease, does not imply authority to establish a trust. The Government's citations in

connection with this argument (G. 44-45) are not in point. Bogert, *Trusts and Trustees,* Vol. 2A, Sec. 361 (1953 ed.), while referring to the public policy favoring trusts for educational purposes, nowhere suggests that this would be sufficient to raise such a trust where none was originally *intended.* In *United States v. Michigan,* 190 U. S. 379, the Government granted certain land to the State of Michigan for canal purposes, "and for no other." This was held to be a trust, but note that the intention to create a trust was clearly expressed by the act of Congress granting the land. The Government's remaining cases cited here are likewise distinguishable.

Nor can the transaction fairly be considered a determinable fee. Here, in effect, the Government is contending for an equitable servitude on personal property, which is contrary to established law. If the "scrap warranty" clause of Government's Exhibit 1 is subordinate to the "agreement" required by Regulation 4, then no problem arises: there were no restrictions when Vineland sold the airplane. If not so subordinate, the "scrap warranty" clause nevertheless is an *agreement,* nothing more, for equitable servitudes on personal property are not recognized in the United States.

Thus, *In re Consolidated Factors Corp.* (1931) D. C. S. D. N. Y., 46 F. 2d 561, 562, involved a petition to reclaim certain stock certificates alleged to have been transferred in violation of an agreement not to do so. The court states (p. 562):

> "Inasmuch as the exchange . . . [of the stock] was a transfer of title . . . the fact that the memorandum of sale . . . contained mutual restrictive covenants is immaterial in my opinion so far as third parties are concerned.
>
> "I hold not only that Greenstein's knowledge of that negative covenant did not bind the Consolidated

Factors Corporation because he was president of that Corporation, but I go still further and hold that, assuming that the Consolidated Factors Corporation did have notice of Greenstein's restrictive covenant as to the sale of the Hartman Tobacco Company stock, that fact would not make it a trustee in equity of the stock for the Hartman Tobacco Syndicate or for the reclaimant . . .

"As a general rule a restrictive covenant on a chattel or other personal property does not follow it into the hands of third persons whether such persons have notice of the covenant or not."

Again, in *National Skee-Ball Co., Inc. v. Seyfried* (1932), 110 N. E. Eq. 18, 158 Atl. 736, 737, there was an action to prevent the use of Skee-Ball equipment except as specified in certain licensing agreements. In finding for the defendant, the court said (p. 736):

"The real question involved is whether a restrictive covenant may attach to personal property and bind successive purchasers with knowledge thereof."

In answering in the negative, the court said (p. 737):

"While an agreement between the seller and the purchaser of personalty limiting its use to a certain locality may be valid as between the immediate parties, I am not ready to hold that such a covenant runs with the property. The trend of judicial action is opposed to limitations and restrictions of the alienability of personal property."

In *Grogan v. Chaffee* (1909), 156 Cal. 611, 105 Pac. 745, the California court held that the seller of olive oil under a price maintenance contract could enjoin his immediate purchaser from selling the oil for less than the price fixed; however, the court stated that the question of whether the contract could be enforced against persons who might come into possession of the plain-

tiff's oil with notice of the restriction imposed by him on its sale but without having made any direct agreement to respect such restriction was not presented.

In *D. Ghiradelli Co. v. Hunsicker* (1912), 164 Cal. 355, 128 Pac. 1041, the California court again refused to discuss the question of equitable servitudes, holding that the defendant was bound under a contract entered into with a wholesaler of chocolate who, in turn, entered into a contract with the manufacturer of the chocolate, stating (p. 359):

> "Under these circumstances we are not called upon to consider the question suggested, but not decided in *Grogan v. Chaffee,* 156 Cal. 611 (27 L. R. A. (N. S.) 395, 105 Pac. 745), whether such a contract between the manufacturer and his immediate vendee could be enforced against persons who might come into possession of plaintiff's product with notice of the restriction imposed by him on its sale, but without having any direct agreement to respect such restriction. . . . It may be assumed as said in *Park & Sons Co. v. Hartman,* 153 Fed. 39 (12 L. R. A. (N. S.) 135, 82 C. C. A. 173), that 'the restrictions imposed by complainant upon sales and resales, *if valid at all are only so because they constitute personal contracts upon which an action will lie only against the contracting party*'."

Both the *Grogan* and *Ghiradelli* cases cite the leading case of *Garst v. Hall & Lyon Co.* (1901), 179 Mass. 589, 61 N. E. 219, which case was an action against a retail drug corporation for selling the plaintiff's proprietary product for less than the contract price. In finding for the defendant, the court said (p. 219):

> "The purchaser from a purchaser has an absolute right to dispose of the property. He may consume it, or sell it to another. The plaintiff has

> contracts from his vendees in regard to the prices at which they will sell if they sell at all. If they sell in violation of their contracts with the plaintiff, he has a remedy against them to recover his damages . . . This right is founded on the personal contract alone, and it can be enforced only against the contracting party. To say that this contract is attached to the property, and follows it through successive sales which severally pass title, is a very different proposition. We know of no authority, nor of any sound principle, which will justify us in so holding."

The case of *Northern Pacific Ry. v. Townsend,* 190 U. S. 267, relied upon by the Government (G. 45) is clearly distinguishable from the situation in the instant case since (1) it involved real property, and (2) the act of Congress granting the land expressly recited its own limitation.

Likewise, as to the Government's citation of *Hale v. Finch,* 104 U. S. 261; *Boal v. Metropolitan Museum of Art* (C. C. A. 2), 298 Fed. 894; and *National Metropolitan Bank v. United States,* 111 Fed. Supp. (Ct. Cls.), 422, they are not in point here. In the *Hale* case a steamboat was sold upon an *express condition written into the transfer document* that the boat would not be used upon certain waters for a *limited* period of time. The court indicated that for a breach of this condition, the seller might reclaim the boat. In the instant case, however, there was no such express condition written into the Government's transfer document, *i. e.,* the sales receipt [International's Ex. "A"]. Nor on the Government's own theory are the Form 65 restrictions at all limited in time. It contends for the contrary.

The *Boal* case, *supra,* dealt with a testamentary trust of personalty which limited alternative remainders. This is not our case. The *National Metropolitan Bank* case,

supra, involved a transfer containing in the *transfer document* express words of reverter. The instant case contains no such words.

The trial judge succinctly discussed the problem as follows [R. 129-130]:

> ". . . Form 65 contains no reservation of power in the Government to revest title to the property, nor any provision that title will automatically revest on violation of the restrictions. Moreover restrictions upon title which restrain alienation and use are not favored by the law.[25] See: Davis v. Gray, 16 Wall. (83 U. S.), 203, 230 (1872); Los Angeles University v. Ewarth, 107 Fed. 798, 803 (9th Cir. 1901).] So where, as here, there are 'no express terms creating a condition, no clause of reentry nor words of any sort indicating such purpose, the conclusion is unavoidable that the obligation in question is a covenant * * *' [Columbia Railway, etc., Co. v. South Carolina, 261 U. S. 236, 248, 250 (1923)] for the breach of which damages would be the only remedy. [See: United States v. Michigan, 190 U. S. 379 (1903); Northern Pacific Railway v. Townsend, 190 U. S. 267 (1903); Emigrant Co. v. County of Adams, 100 U. S. 61, 71 (1870).]"

Finally, the Government argues that " 'any ambiguity in a grant is to be resolved favorably to a sovereign grantor' " (citing cases) (G. 40). We do not dispute this is an abstract proposition of law. But it does not apply here. The Government points out nothing, no

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[25]In its footnote 29 (G. 40) the Government states that "it should be noted that *considerations of public policy* which, as the district court noted [R. 130] have caused courts to strike down or avoid unreasonable restraints on alienation have no bearing on transfers authorized by congress." In fairness to the district court, it said no such thing, as reference thereto shows.

word, phrase or sentence which it claims is capable of a double construction, so to request that it be construed in its favor. Certainly, an ambiguity will not be implied in order to reach that result artificially.

II.

Vineland's Disposal of the Plane in 1951 Passed Full Title to the Finns.

A. The Documents Show a Plain Intent to Transfer Title.

On February 28, 1951, Vineland and the Finns entered into a written contract for the sale of the aircraft in suit [Vineland's Ex. "B"]. We quote from portions of this contract:

"I.

"The District hereby transfers all of its right, title and interest in and to that certain C-46 Aircraft #23645 to the Contractors, effective immediately upon the execution of this agreement. Concurrently with the execution of this agreement the District agrees to execute a Bill of Sale and/or transfer of title to the said aircraft to the Contractors.

"II.

"The Contractors hereby agree, and *do hereby accept the possession and title of said C-46 Aircraft #23645, as evidenced by this agreement, and the aforesaid Bill of Sale and/or transfer of title; provided, however, the Contractors agree that irregardless of the transfer of possession and title of said C-46 Aircraft #23645, the sole use of said aircraft shall be and the same is reserved to the District for educational purposes only,* until such time as all of the terms and conditions set forth in this agreement are fully performed by Contractors in a reasonable and competent manner; . . .

"III.

"For and in consideration of the transfer of all of its right, title and interest in and to the afore-described C-46 Aircraft #23645 by the District to the Contractors, the Contractors expressly AGREE *as follows:"*

Clearly, this language shows a plain intent to transfer immediate title. As indicating its further intent so to do, on April 14, 1951, Vineland made, executed and delivered to the Finns a Civil Aeronautics Administration form bill of sale, whereby Vineland as Seller did "hereby sell, grant, transfer, and deliver all of [its] right, title and interest in and to such aircraft unto" the Finns, who were named therein as purchaser [International's Ex. "A," App. "C"]. This document was backdated to February 28, 1951, because, as Superintendent Bancroft testified, "We just didn't take the time to sign the bill at the time of agreement and accepted by the Board" [R. 565].

In seeking to backtrack upon the effect of these acts Vineland in its opening brief[26] (V. 8) contends that its said contract of February 28, 1951, was subject to a condition precedent. The provision referred to, paragraph IV of the contract, provides that:

". . . this agreement is contingent upon Contractors' ability to secure the necessary clearances from the Government *of the United States of America on restrictions now existing on the use and possession of the afore-described C-46 Aircraft #23645, by virtue of the Deed of Conveyance of said aircraft from the said Government of the United States to the District, and by virtue of related Federal laws on the use thereof."*

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[26]Page references to Vineland's brief are designated "(V. .....)"

The italicized portion of the quoted provision was not set forth by Vineland (V. 8). We believe that it is of importance here.

In the first place there were no restrictions "by virtue of the deed of conveyance," which was the War Assets Administration sales receipt of July 10, 1946 [International's Ex. "A"]. The further specification of restrictions, "by virtue of related Federal laws," shows that the words "by virtue of" are intended to mean "in"[27]; otherwise, no reason for the specification exists: the the clause would be superfluous, which is not to be presumed. We have already seen that no restrictions in "related Federal laws," meaning the Act and its Regulation 4, oppose Vineland's transfer to the Finns.

However, even if Vineland's Exhibit "B" intended to refer to the Form 65 restrictions by some vague form of incorporation by reference, they would not operate to prevent Vineland's sale if those restrictions were invalid, as we believe we have shown them to be. If the unlimited restriction of Form 65 is valid but merely contractual in effect giving rise to damages for its breach, paragraph IV would still not prevent Vineland's sale, for it is clearly a *condition subsequent* thereto.

> "A condition subsequent in a contract is one which follows liability upon the contract and operates to defeat or annul such liability upon the subsequent failure of either party to comply with the condition." (12 Am. Jur., Contracts, Sec. 850.)

Title having already passed by paragraphs I and II of Vineland's said Exhibit "B," the further condition followed a *fait accompli,* and therefore related to rights subsequent thereto. The intention of the parties so to regard paragraph IV is reinforced by Vineland's delivery

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[27]The Notice for Bids [Vineland's Ex. A] uses the word "under" in the same sense.

to the Finns of a bill of sale to the plane on April 14, 1951, *backdated* to February 28, 1951.

Vineland next contends that only a condition precedent would be "legal and proper," since the contract must contain the same provisions as appeared in the notice for bids (V. 9). Elaborate as it is, Vineland's reasoning here is predicated upon a false assumption. The notice for bids did not specify the "release" as a *condition precedent to passing title,* only that releases must be secured. The contract, Vineland's Exhibit "B," conforms thereto.

In its own attempt to invalidate the Vineland-Finn transfer and thereby shed its liability on the counterclaim, the Government makes a similar statement which should be compared with the record. It says (G. 70), "the Notice indicated that there would be no transfer of the plane until Government clearance had been obtained . . ." *We deny that the Notice says any such thing.*

The Government next claims (G. 70) variance between the Notice [Vineland's Ex. "A"] and the contract [Vineland's Ex. "B"], saying "In addition, the Notice indicated that no sale would be made at any time unless the requisite clearances were obtained, but the contract indicated that the Finns could eventually obtain the plane for salvage use even though clearance was not obtained." It may be noted that the first part of this sentence assumes the same fact challenged above.[28] The second part likewise is not supported by the record. For Vineland's contract Exhibit "B" (Par. IV(4)) provides

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[28]The pertinent provision provides: "Bidders are expressly notified that the aforesaid aircraft was acquired by the district from the Government of the United States and the War Assets Administration, subject to certain restrictions on the use thereof *under the deed of conveyance,* and the successful bidder will be required to secure the necessary releases to said restrictions from the proper governmental agency of the United States of America." [Vineland's Ex. A.]

that without releases, the Finns shall be entitled to delivery of the plane for salvage *"provided, satisfactory assurance is given to the District that existing Governmental restrictions will not be violated by the Contractors, or by any other person, firm or corporation, with or without the consent of the Contractors . . ."*

With said proviso quite a different picture appears, one which is quite consistent with the Notice. The law does not require an idle act. If no restrictions existed, it is not to be presumed that Vineland's Notice required releases from no restrictions. Even arguing that the Notice did nevertheless so require, the assurance required by Vineland's contract proviso is a substantial equivalent thereto. Such assurance could not be *satisfactory* unless it served the same purpose as the releases.

We note in passing that this point was raised by the Government, not by Vineland so as to entitle Vineland to rely thereon. In any event, we believe we have shown that it is without merit.

Vineland next argues that it could not properly pass title without first receiving performance, otherwise would be to *lend the credit* of the District, contrary to the California Constitution, Article IV, Section 31; and that if this was intended, "it must be determined that the agreement was illegal and void." (V. 10). Vineland's brief does not set forth the direct constitutional prohibition relied upon, either verbatim or by summary; nor does Vineland cite this court to any case which it claims has applied such prohibition to a situation like the one present here. We believe that the prohibition does not apply to the facts at bar. The provision appears to be aimed at prohibiting the State or its political subdivisions from borrowing or otherwise involving themselves upon their credit. In our case, Vineland was not a borrower, it was a seller. Vineland borrowed nothing; it simply sold a plane to the Finns. The sale was on

the Finns' credit, not Vineland's. Indeed, the Finns were required by said contract to post a faithful performance bond in the sum of $2,100 with Vineland [Par. III(5) of Vineland's Ex. "B"], so it is evident that with respect to the balance of the consideration, the Finns' credit was relied upon. Vineland's credit is nowhere involved. This Conclusion receives additional weight when viewed in light of the fact that the Kern County Counsel drew up the contract, Vineland's Exhibit "B," and approved the legal aspects thereof [R. 258].

Vineland next contends for an ambiguity in said contract, respecting the time title was to pass (V. 11). We deny that any ambiguity exists. It is the intent of the school board, not Superintendent Bancroft (who was its agent but not a member) which is relevant; hence its references to testimony by Mr. Bancroft are irrelevant. As to Board Member Johnson's testimony, it nowhere refutes the intent manifested by Vineland's contract and bill of sale to the plane. By the parol evidence rule it could not.[29]

Vineland lists (V. 11) other factors which it says established the ambiguity as to when title passed. A discussion of each is unnecessary because, at most, they pose only a question for the determination of the trial court. And here, by an express finding, the trial court has found that "on February 28, 1951, [Vineland] did sell and did transfer constructive possession of said air-

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[29]When Vineland attempted to show Board Member Johnson's contrary intention an objection thereto was interposed by the Government [R. 590], and sustained by the court [R. 593], the court observing: "I don't think it is competent for the seller to get on the stand and say, 'I didn't think I was doing that'; any more than he could get on when he signs the promissory note, he can't be heard to get on the stand and say, 'I didn't really think I was obligating myself to pay. I didn't intend that.' What he objectively manifested, that is what we are to judge his intention by.

"The objection will be sustained."

craft to Defendant Charles C. Finn and Defendant George C. Finn" [R. 150]. As a conclusion of law the trial court held to the same effect [R. 156].

Vineland asks this court to regard, instead of the foregoing, the special verdict of the advisory jury in answer to Interrogatory No. 2, that it did not intend to transfer title before "all necessary consents and releases and waivers" had been procured (V. 11). It is true that the trial court adopted the jury's findings as its own [R. 156]. But under the trial court's ruling, there were no consents, releases or waivers to be obtained. If this court rules differently, still Vineland is faced with a specific finding that on February 28, 1951, Vineland "did sell" the plane. If a general finding is inconsistent with a specific finding, the latter controls (53 Am. Jur., Trial, Sec. 1141; cases collected in 23 McKinney's Dig. 882). Accordingly, the specific finding here [Finding No. 3, R. 150] must control the general finding [Finding No. 21, R. 156] incorporating the findings of the advisory jury.

But "the conditions of the subject agreement and related documents have not been performed," Vineland complains (V. 12-13). Admittedly, Vineland did receive part performance [R. 473]. If the Finns' obligations were conditions subsequent, as we believe we have shown they were, that Vineland did not receive the balance matters not. The judgment of the trial court was expressly made without prejudice to such claims by Vineland against the Finns [R. 158]. Further, it is to be noted there was no finding made that the Finns were in default under Vineland's Exhibit "B." Indeed, the fact seems to be to the contrary.[30]

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[30]Superintendent Bancroft's testimony on this point was that no notice of default or similar document had ever been served on the Finns, and "we never saw any evidence that they would not perform" their contract. [R. 543.]

In its Point II Vineland urges (V. 14) that the District Court erred in failing to rule that Vineland's Exhibit "B" and related documents was a conditional sales contract. We have no quarrel with the law Vineland cites relating to title-retained contracts. It is good law. But it does not apply here, simply because Vineland did not retain title, it delivered it to the Finns. It delivered it with its contract Exhibit "B," and confirmed its intention some six weeks later with its bill of sale to the plane, International's Exhibit "A." Vineland's factual argument that this transaction constituted a conditional sales contract is substantially a duplication of its factual argument that the contract Vineland's Exhibit "B" constituted a contract with conditions precedent to the passage of title. Duplicating our answer thereto would serve no useful purpose, nor do we believe that this court requires citations to illustrate the difference between Vineland's Exhibit "B" (and subsequent bill of sale) and a conditional sales contract.

B. Vineland's Transfer Was Authorized by Law.

California Education Code, Section 18701, provides the authority for Vineland to make the transfer in question.[31] In its brief, Vineland makes no contention that the sale to the Finns violated this section; indeed, as we have seen, Vineland's counsel, the Kern County Counsel, approved the transaction as to its legal aspects when it was entered into [R. 258].

But the Government *does* challenge the sale on this ground, as a possible solution to its liability on the counterclaim (G. 69). Both its contention and the answer thereto may best be stated in the words of the trial judge, as follows [R. 131]:

> "It is urged nonetheless that the sale to defendants Finn is void because the consideration included

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[31]Set forth at G. 69.

labor and materials as well as cash. The applicable California statute provides in part that the 'board of any school district may sell * * * for cash * * *' [Cal. Ed. Code Sec. 19801.] This statute is permissive only; the auxiliary verb 'may' does not limit the authority conferred to cash sales. It follows that at least as early as February 28, 1951, defendant School District passed valid title to defendants Finn."

Nothing in *Miller v. McKinnon,* 20 Cal. 2d 83, 124 P. 2d 34, compels a different result. In that case the Board of Supervisors of Santa Clara County authorized McKinnon, a member thereof, to have certain work done to a county quarry. Part of the work was done and paid for. A taxpayer sued to recover it, alleging that no bids for the work were called for. The court held merely that such a complaint stated a cause of action since compliance with the terms of a statute requiring competitive bidding and advertising by bids is mandatory. In the instant case there was both advertising and bidding [R. 516].[32] Therefore, the cited case proves nothing in so far as the instant case is concerned. The same is true in respect of *Los Angeles Dredging Co. v. Long Beach,* 210 Cal. 348, 291 Pac. 839; *Reams v. Cooley,* 171 Cal. 150, 152 Pac. 293, and *Zottman v. San Francisco,* 20 Cal. 96. All relate to failure to comply with *bidding* requirements, and all are cited in *Miller v. McKinnon, supra,* as authority for the decision in that case. None are even remotely analogous to the facts at hand.

Moreover, it should be noted that Vineland's contract Exhibit "B" *does* provide for the Finns to pay Vineland a cash consideration of $5,000 (Par. III(2)). It would be strange indeed if a contract providing for a cash con-

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[32]Noteworthy are the recitals to that effect in Vineland's contract, Exhibit "B".

sideration of $5,000 and otherwise valid should become invalid because it requires other considerations as well. Particularly is this so where as here the Finns were the only bidders [R. 150].

Likewise, it would be strange if the Government could successfully raise this point where Vineland in its own appeal has chosen not to do so. The Government is not in the standing of a taxpayer as in *Miller v. McKinnon, supra,* nor has it shown, as was deemed essential in that case, that it has first demanded that corrective action be brought by designated county authorities, and they have failed to do so.

We submit that Vineland's transfer of the plane to the Finns was authorized by law; and that deviation, if any, therefrom was minor, insubstantial, and not within the capacity of the Government as complaining party to complain of.

III.

As a Bona Fide Purchaser (Encumbrancer, Accessor), International Is Entitled to Prior Rights in the Plane.

A. International Is a Bona Fide Purchaser (Encumbrancer, Accessor).

1. *Under the Act.* Under Section 25[33] of the Surplus Property Act, not only International, but also Vineland and the Finns are to be considered bona fide purchasers[34] from the Government. This is the effect of the holding of this court in *United States v. Jones* (CCA 9), 175 F. 2d 278.

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[33]Set forth *supra,* p. 40.

We note that the Government has failed to include Section 25 in its Appendix B (G. 81-84).

[34]As used herein the term "purchaser" includes "encumbrancers" and "accessors".

In Jones' brief on appeal it is stated (pp. 29-30):

> "It is to be noted that Section 25 used the term 'bona fide purchaser for value.' Congress did not use the term bona fide purchaser for value *without notice,* as now commonly used under the Uniform Sales Act (Calif. Civil Code Section 1744) but omitted the requirement concerning absence of notice. The fact that the factor of 'value' was specifically mentioned in addition to the requirement 'bona fide' makes even clearer the intent to omit any requirement as to 'notice.'"

Thus it is clear that International was a bona fide purchaser under the Surplus Property Act, prior in right to the United States seeking to reclaim surplus property of which it has disposed.

2. *Apart from the Act.* The trial court made findings of fact as follows:

> "8. Said aircraft required substantial repairs before it could be considered airworthy. On August 31, 1951 [the Finns] as mortgagor executed a chattel mortgage on said aircraft to [International], as security for a loan of $15,000[35] . . ."
>
> "9. * * * Said aircraft remained in . . . International's possession until May 25, 1952, during which time . . . International bestowed labor and materials for its repair and improvement, of the reasonable value of $10,200 for which . . . International claimed an aircraft lien under the provisions of California Code of Civil Procedure Section 1208.61 *et seq.* * * *"
>
> "10. *Said loan was made and said labor and materials were bestowed by Defendant International in*

[35]International's cancelled check for $15,000 is in evidence as its Exhibit F.

the ordinary course of its business believing in good faith that Defendants Finn were the true and lawful owners of the aircraft."

It is true that in its special verdict the advisory jury found that International had "either knowledge or notice" of (1) "interests and claims of . . . Vineland", and (2) that the Government "claimed restrictions upon the use or sale of the airplane in suit" when International advanced the money and did the work on the plane [R. 115]. However, the special verdict, including the foregoing, *was carried into the trial court's findings of fact* by a *general finding only* [Finding 21, R. 156]. The trial court's finding of International's good faith, notwithstanding such knowledge or notice, was a *specific* finding. The rule is well settled that if a general finding is inconsistent with a specific finding, the latter controls.[36] (53 Am. Jur., Trial, Sec. 1141; cases collected in 23 McKinney's Dig. 882). Accordingly, the specific finding of International's good faith [Finding No. 10, R. 152] must control the general finding incorporating the findings of the advisory jury [Finding No. 21, R. 156].

B. As Against International, the Government Is Estopped to Deny That It Passed Title to Vineland.

The principles of estoppel are familiar in equity, whether by deed, or *in pais*. Thus by his deed one is estopped to deny that he granted or that he had good title (*Rhine v. Ellen*, 36 Cal. 362). Estoppel *in pais* or equitable estoppel refers to all estoppels otherwise than by record, deed or contract (10 Cal. Jur. 625). One form of this is permitting apparent title to be in another whereby an

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[36]The advisory jury's said finding as substantially quoted is still far short of knowledge that the Govenrment still claimed title. For obviously, International couldn't know that the Government claimed title if as found by the jury International in good faith believed that the Finns were the true and lawful owners of the airplane.

innocent third party is led into dealing with him to its damage (10 Cal. Jur. 641).

The Government may contend that it cannot be estopped to assert title to the airplane, either by deed or *in pais*. We believe the law is to the contrary where as here the Government initiates suit and asks for equitable relief in the form of a declaratory judgment. That such form of remedy is equitable is well established.

Gordon Johnson Co. v. Hunt (D. C. Ohio 1952), 102 Fed. Supp. 1008;

Crosley Corp. v. Westinghouse, 43 Fed. Supp. 690;

Caven v. Clark (D. C. Ark. 1948), 78 Fed. Supp. 295;

Sellers v. Johnson (D. C. Iowa 1946), 69 Fed. Supp. 778, reversed on other graunds, 163 F. 2d 877.

Thus in *United States v. Stinson,* 197 U. S. 200, 205:

> "It is a good defense to an action to set aside a patent that the title has passed to a bona fide purchaser, for value, without notice. And, generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the Government, but will also protect the rights and interests of innocent parties (citations)."

The rule, its reasons, and authorities have been stated in the well-reasoned case of *Daniell v. Sherrill* (Fla. 1950), 48 So. 2d 36, as follows:

> "It should be borne in mind that here the State has come into its courts and impleaded its own citizens and asked that title in the State be quieted against the claims and equities of those citizens. The State is the moving party: it invoked the jurisdiction of a court of equity. The Sovereign, in such a situation is bound by the maxim, 'He who seeks equity must do equity', to the same extent that any citizen would

be bound. It has been aptly said: 'If we say with Mr. Justice Holmes, "men must turn square corners when they deal with the government", it is hard to see why the Government should not be held to a like standard of rectangular rectitude when dealing with its citizens.' 48 Harvard Law Review, 1299. See the case of State of Iowa v. Carr, 8 Cir., 191 F. 257, 266 where the Court said:

" 'But the great weight of authority, the stronger reasons and the settled rule upon this subject in the courts of the United States, is that, while mere delay does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet, when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by *every other principle and rule of equity* applicable to the claims and rights of private parties under similar circumstances.

" 'The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances. *United States v. Stinson,* 197 U. S. 200, 204, 205, 25 S. Ct. 426, 49 L. Ed. 724;' (and citing many other cases).

"In the cited case equitable estoppel to assert title to lands was held to bar the State of Iowa.

"In *United States v. Stinson*, 7 Cir., 125 F. 907, 910, affirmed 197 U. S. 200, 25 S. Ct. 426, 49 L. Ed. 724, the doctrine of estoppel was applied to the United States, the Court saying: 'The government may not in conscience ask a court of equity to set on foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. The

substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals (citations)."

The *Daniell* case is annotated in 23 A. L. R. 2d 1410, "Estoppel of United States, State, or political subdivision by deed or other instrument." There (p. 1424) it is stated:

"That sovereignty of the state or the United States alone will not prevent an estoppel by deed receives direct support in other cases in which, although not discussing the effect of sovereignty alone in this regard, the courts have held, upon the merits of the individual cases involved, that the sovereign was estopped by various types of instruments, or the recitals therein.

"United States.—Fletcher v. Peck (1810), 6 Cranch 87, 3 L. ed. 162, *infra,* this section; *Lindsey v. Hawes* (1863), 2 Black 554, 17 L. ed. 265, *infra,* Sec. 5; *St. Paul & Pacific R. Co. v. Schurmeir* (1869), 7 Wall 272, 19 L. ed. 74, *infra,* Sec. 5; *Branson v. Wirth* (1873), 17 Wall. 32, 21 L. ed. 566 (dictum), *infra,* Sec. 5; *Cahn v. Barnes* (1881, C. C. Or.), 7 Sawy. 48, 5 F. 326, *infra,* this section."

In the instant case, the Government has come into its own court to seek a declaratory judgment.

"But when the government seeks its rights at the hands of a court, equity requires that the rights of others as well be protected. *Carr v. United States,* 98 U. S. 438, 25 L. Ed. 209. The Government may not in conscience ask a court of equity to set on foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. The substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals (citations)" (*United States v. Stinson,* 125 Fed. 907, 910.)

By its sales receipt of July 10, 1946 [International's Ex. A] the Government transferred title to the airplane. By its Release of Custody of Aircraft dated July 25, 1946 [Government's Ex. 4] the Government transferred possession. Vineland thereby was permitted by the Government to appear as owner for all purposes. When International's interest attached in good faith and for value, the Government in this suit should, like any private litigant seeking equity, be estopped to deny the reasonable effect of its acts.

It is likewise in the issuance by the Administrator of Civil Aeronautics to the Finns of a certificate of registration. It is true under the Civil Aeronautics Act of 1938, as amended (49 U. S. C., Sec. 521) that such certificate is not evidence of ownership in any proceeding where ownership is an issue. But it is undisputed that the CAA went further here. This was a first registration. CAA was aware that the airplane was owned by Vineland, and previously had been purchased under educational disposal provisions of Regulation 4 [R. 400]. Its duty was to receive evidence of ownership before registering the plane to the Finns.[37]

International relied and was entitled to rely on this registration certificate so issued,[38] as a representation that

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[37]The CAA in its official form of application for a registration certificate sets forth an instruction as follows:

"New or Previously Unregistered Aircraft—The applicant for registration of a new or previously unregistered aircraft must submit proof of his ownership." [International's Ex. M.]

[38]International also relied upon a report by an established aircraft title searcher in Washington who reported that from CAA records title was clear [R. 628; International's Exs. "K," "L"]. International's witness testified this was in the ordinary course of business [R. 629], and one of the Government's expert witnesses, Gordon D. Strube, likewise testified that a check by a title service who goes over to the CAA and checks through the file "is the usual case" [R. 675].

the Government officials who authorized it had obeyed the law; that clearances were unnecessary, or if necessary, they had been duly obtained from the proper agency. CAA knew that Federal Security Administration was the proper agency.[39] So relying, International loaned the Finns $15,000 in cash, and performed $10,200 worth of work on the airplane.

Since the Government intentionally created a record title in the Finns, and thus led International to believe that it was true, and to act upon it, the case comes squarely within the rule codified in the Code of Civil Procedure, Section 1962:

> "The following presumptions, and no others, are deemed conclusive:
>
> "* * * * * * * *
>
> "3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it; . . ."

So stated, this is a positive rule of law. No requirement regarding notice or the lack of it is imposed.

Even as a rule of equitable estoppel, ignorance of the fact is not always required. In 19 Am. Jur. 740 "Estoppel", it is said:

> "It is not always true, however, that no estoppel will arise when the party to whom the representation

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[39]At a meeting in Washington with George C. Finn concerning his desire to register the plane with CAA, representatives of both CAA and FSA were present [R. 691]. FSA's witness, Edward G. Bradley, was aware that the Finns intended to register the aircraft with CAA and intended to fly it [R. 726]. Yet FSA took no steps to prevent the registration [R. 728]. Also, Mr. Bradley testified that he knew of no reason why FSA could not have sent a copy of WAA Form 65 to CAA for insertion into the file of the plane [R. 807].

is made has knowledge as to the truth of all the facts. For example, the owner of a known right or title may by his representations, acts, or silence *so lead another to act in the belief* that the owner has waived, surrendered, or abandoned his right or title that he will be estopped from asserting it to the injury of him who has changed his position in reliance upon the owner's representations, acts, or silence. Likewise, it seems that where property is taken for public uses, it is not necessary, in order to enable the taker to invoke the doctrine of estoppel against the owner, that he shall have been acting in ignorance of the real condition of the title."

Likewise in *Estate of David*, 38 Cal. App. 2d 579, 584, where the court states:

". . . Though ignorance of the truth is a primary essential on the part of the one pleading an estoppel *in pais,* our courts have recognized another species of estoppel, called *'quasi* estoppel,' which is based upon the principle that one cannot blow both hot and cold, or that one 'with full knowledge of the facts shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another.' (10 Cal. Jur., p. 645; *McDaniels v. General Ins. Co.,* 1 Cal. App. (2d) 454, 459 (36 Pac. (2d) 829).)"

The Government here is attempting to blow both hot and cold. Its regulations (14 C. F. R. 501.4) require an applicant for registration to submit proof of ownership satisfactory to the Administrator of Civil Aeronautics [R. 723]. Since registration was here issued, we must assume that the submitted proof was in fact satisfactory to that official, who by his agents had actual notice of the Government's claims [R. 692]. Other officials in the Federal Security Administration had actual notice of the Finns' intention to seek and obtain registra-

tion [R. 703, 726]. By force of statute, they had at least constructive notice of the registration itself on April 16, 1951. These included Mr. Baxter, then Chief, Surplus Property Utilization Division, who had authority to waive the restrictions [R. 728]. Yet neither he nor anyone else in Federal Security Administration did anything to record a copy of Government's Exhibit 1 with Civil Aeronautics Administration [R. 728]. This alone may have afforded a *caveat* to the belief disseminated by the Administrator of Civil Aeronautics that he knew of no reason why the Finns' proof of ownership was not satisfactory to him.

Indeed, officials of Federal Security Administration did nothing at all on the matter to bring to International's notice that the Government claimed title to the aircraft until it filed the instant action some fourteen months later, on July 3, 1952. This was after International's interest had attached in reliance upon the record title, which the Government by "blowing hot," both created and failed to deny.

In its position as a suitor seeking equitable relief, the Government is not immune from an equitable estoppel arising from these facts. (See *Smale & Robinson, Inc. v. United States* (D. C., S. D. Cal.), 123 Fed. Supp. 457.) The trial court recognized this by granting leave to International to file its amendment to answer pleading these facts as issues in this lawsuit at the close of trial [R. 107].

C. As Against International, Vineland Is Estopped to Deny That It Passed Title to the Finns.

So also, Vineland is subject both to estoppel by deed, and estoppel *in pais*. Its bill of sale dated February 28, 1951, recites that it is the owner of the "full legal and beneficial title of the aircraft," and "certifies that same is not subject to any mortgage or other encumbrance."

As against International, Vineland now is estopped to deny that its bill of sale passed the title it purported to pass.

Moreover, Vineland is estopped to deny the truth of the recitations in its contract, Vineland's Exhibit "B," which are as follows:

> "WHEREAS, the District did heretofore advertise for bids for the sale of a C-46 Aircraft #23645, *in the manner prescribed by law and in the manner prescribed by the applicable provisions of the Education Code of the State of California,* and
>
> "WHEREAS, the Contractors submitted their written bid to purchase said C-46 Aircraft #23645 from the District. *Said bid was in accordance with the aforesaid 'Notice Calling for Bids' and with the specifications adopted by the District and referred to in said notice,* a copy of which specifications are attached hereto, marked 'EXHIBIT A,' and made a part hereof as if fully set out at length; and
>
> "WHEREAS, the bid submitted by the Contractors was the only bid received by the District *and was duly accepted by the District in the manner provided by law, and in the manner provided by applicable provisions of the Education Code;*".

Code of Civil Procedure, Section 1962(2), provides:

> "The following presumptions, and no others, are deemed conclusive:
>
> "* * *
>
> "2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration;".

This statute makes no exception in favor of school districts.

The facts present also make out an equitable estoppel against Vineland, from which it is not immune. Vineland delivered title of the airplane to the Finns, and clothed them with apparent (if not true) ownership. Vineland then released the plane to the Finns knowing that they intended to license it, and that this would require that additional work be done on it [R. 543]. Upon these acts International relied to its damage. The facts giving rise to estoppel *in pais* are clearly present.

Nor does the law permit Vineland to escape the effect of estoppel merely because it is a political subdivision of the State of California.

In *People v. Gustafson,* 53 Cal. App. 2d 230, 242, the court states:

> "A state, as well as an individual, may be estopped where the necessary elements or grounds of estoppel are present (*City of Los Angeles v. Cohn,* 101 Cal. 373 (35 Pac. 1002); 31 C. J. S., Sec. 138, p. 405); it may be estopped when acting in its proprietary capacity as distinguished from its governmental capacity (31 C. J. S., Sec. 140, p. 413); and it may be estopped by the acts of its public officials done in the exercise of powers expressly conferred by law, and by their acts or omissions when acting within the scope of their authority (31 C. J. S., Sec. 142, p. 417)."

In *Brown v. Town of Sebastopol,* 153 Cal. 704, the Town entered into a contract with Brown for some real estate. The contract was defective because it was oral, and the board of trustees' minutes failed to show the Town's acceptance. However, the Town performed certain work required of it and took possession. Brown's

devisees sued to quiet title; held, for the Town. The court states (p. 709):

> ". . . It is well settled that the contract of a municipal corporation, when exercising other than its governmental functions, and within the limits of its charter powers, are construed by the same laws that govern the contracts of private parties. Thus the doctrine of estoppel in such a contract may be invoked on behalf of or against a municipality. Says Bigelow on Estoppel (sec. 1128): 'But it is a well-settled principle, applicable alike to the states and the United States, that whenever a government descends from the plains of sovereignty and contracts with parties, such government is regarded as a private person itself, and is bound accordingly. A state in its contracts with individuals must be judged and must abide by the same rules which govern individuals in similar cases, *and when such a contract comes before a court the rights and obligations of the contracting parties will be adjudged upon the same principles as if both contracting parties were private persons.*' (See, also, *Sacramento County v. Southern Pacific Co.,* 127 Cal. 222 (59 Pac. 568, 825); *Contra Costa County v. Breed,* 139 Cal. 432 (73 Pac. 189).) . . . Plaintiffs here seek to hold all the benefits while refusing performance. They are estopped from so doing, under fundamental and well-settled principles."

In *Farrell v. County of Placer,* 23 Cal. 2d 624, plaintiff failed to file a timely claim for her personal injuries because of certain conduct of county officials. The claim statute is mandatory, and the county contended that its requirement could not be waived or excused by estoppel; *held,* for plaintiff. The court states (p. 627):

> "It has been said generally that a governmental agency may not be estopped by the conduct of its

officers or employees (10 Cal. Jur. 650-651), but there are many instances in which an equitable estoppel in fact will run against the government where justice and right require it. (*City of Los Angeles v. Cohn,* 101 Cal. 373 (35 P. 1002); *Fresno v. Fresno C. & I. Co.,* 98 Cal. 179 (32 P. 943); *Sacramento v. Clunie,* 120 Cal. 29 (52 P. 44); *Brown v. Town of Sebastopol,* 153 Cal. 704 (96 P. 363, 19 L. R. A. N. S. 178); *Times-Mirror Co. v. Superior Court,* 3 Cal. 2d 309 (44 P. 2d 547); *Sutro v. Pettit,* 74 Cal. 332 (16 P. 7, 5 Am. St. Rep. 442); *City of Los Angeles v. County of Los Angeles,* 9 Cal. 2d 624 (72 P. 2d 138, 113 A. L. R. 370); *Contra Costa Water Co. v. Breed,* 139 Cal. 432 (43 P. 189); *County of Los Angeles v. Cline,* 185 Cal. 299 (197 P. 67); *La Societe Francaise v. California Emp. Com.,* 56 Cal. App. 2d 534 (133 P. 2d 47); *McGee v. City of Los Angeles,* 6 Cal. 2d 390 (5 P. 2d 925); *Ernst v. Tiel,* 51 Cal. App. 737 (197 P. 809); *People v. Gustafson,* 53 Cal. App. 2d 230 (127 P. 2d 627); *Hewel v. Hogin,* 3 Cal. App. 248 (84 P. 1002).) *It has been aptly said: 'If we say with Mr. Justice Holmes, "Men must turn square corners when they deal with the Government," it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.'* (48 Harv. L. Rev. 1299.)"

If these purposeful words have any meaning at all. they require no clarification. We submit that Vineland *can* be, and on the facts here present *are* estopped both in deed and *in pais.*

D. International Has a Valid Recorded Chattel Mortgage.

International's chattel mortgage securing its loan of $15,000 was recorded by CAA on November 14, 1951 [Finding 8, R. 152]. As seen, the trial court found that the loan was made in *good faith* [Finding 10, R. 152].

Even if this court should regard instead the advisory jury's finding that International had "knowledge or notice" of the Government's claimed restrictions and Vineland's interests and claims, this cannot defeat International's recorded chattel mortgage. "Actual notice" alone can defeat such rights.

Section 503(c) (52 Stat. 977, 49 U. S. C. 523(a)) provides:

> "No conveyance . . . shall be valid . . . against any person other than the person by whom the conveyance or other instrument is made or given . . . or any person having *actual notice* thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator. For the purposes of this subsection (c), such conveyance or other instrument shall take effect from the time and date of its filing for recordation, and not from the time and date of its execution."

We do not believe that Form 65 is a conveyance. It is by intent an application containing a certification and an agreement imposing personal covenants only. But if the Government's contention to the contrary be accepted, its rights if any must be recorded, or International must be shown to have *actual notice* thereof.

California Civil Code, Section 18, provides:

> "Notice is:
>
> "1. Actual—which consists in express information of a fact; or,
>
> "2. Constructive—which is imputed by law."

California Civil Code, Section 19, provides:

> "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

The advisory jury's findings that International had "either knowledge or notice" falls short of a positive finding of actual notice. Nowhere in this record appears even a scintilla of evidence that International had *actual notice* of the restrictions,[40] or of Vineland's claims. These findings to be supported at all must be on the theory of *constructive* notice, which fails to meet the requirement of *actual* notice in Section 503(c) above.

E. Internaitonal Has a Valid Aircraft Lien.

The trial court found that the aircraft in suit "remained in . . . International's possession until May 25, 1952, during which time . . . International bestowed labor and materials for its repair and improvement, of the reasonable value of $10,200 for which said . . . International claimed an aircraft lien under the provisions of California Code of Civil Procedure, Section 1208.61, *et seq.*[41] . . . International contends that it has at no time released said claimed lien or consented to possession in the

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[40]In his discussions with International's representative Mr. Batchelor, George C. Finn testified he never discussed WAA Form 65 [R. 441]; Mr. Batchelor testified he had never seen a Form 65 or heard of any restrictions or scrap warranty at the time International loaned the $15,000 [R. 625] or did the work on the plane [R. 633]. There was no other contrary evidence on "actual notice" to International.

[41]Sec. 1208.61: "Subject to the limitations set forth in this chapter, every person has a lien dependent upon possession for the compensation to which he is legally entitled for making repairs or performing labor upon, and furnishing supplies or materials for, and for the storage, repair, or safekeeping of, any aircraft, . . ."

Sec. 1208.62: "That portion of such lien in excess of two hundred fifty dollars ($250) for work or services rendered or performed at the request of any person other than the holder of the legal title is invalid, unless prior to commencing such work or service the person claiming the lien gives actual notice to the legal owner and the mortgagee, if any, of the aircraft, and the written consent of the legal owner and the mortgagee of the aircraft is obtained before such work or services are performed. For the purposes of this chapter the person named in the federal aircraft regis-

Defendants Finn after May 25, 1952." The Finns took the plane from International's possession on May 25, 1952, without its consent [R. 476-479]. Hence International's lien was not lost. (See *Huie v. Howard Soo Hoo,* 132 Cal. App. (Supp.) 787, 793.)

However, the Government contends there can be no lien as against its interest, if any, without its consent (G. 53). That rule applies where the Government is carrying out its sovereign functions with respect to property to which it has full title. N 111H was not such an item of property after its sale to Vineland. If the Government retained any interest in the aircraft, it was certainly something less than the bundle of rights which we recognize as full ownership. International submits that such an interest, if any, was subject to lien.

Thus in *United States v. United Aircraft Corp.* (D. C. Conn., 1948), 80 Fed. Supp. 52, 2 Avi. 14663, War Assets Administration sold two aircraft to Hoosier and took back a mortgage on each. The mortgages were recorded with the CAA. Hoosier removed the engines from one aircraft and had them overhauled by United. United claimed an artificer's lien superior to the Government's mortgage. The Government sued in replevin. Defense, that the engines were not particularly described in the mortgage, and hence the mortgage was not binding on defendant. Held, for defendant. The court states:

> ". . . The statute, by its recordation requirement, voids as to third parties, without actual notice,

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tration certificate issued by the Administrator of Civil Aeronautics shall be deemed to be the legal owner."

Sec. 1208.64: "Whenever the lien upon any aircraft is lost by reason of the loss of possession through trick, fraud, or device, the repossession of such aircraft by the lienholder revives the lien, but the lien so revived is subordinate to any right, title, or interest of any person under any sale, transfer, encumbrance, lien, or other interest acquired or secured in good faith and for value between the time of the loss of possession and the time of repossession."

conveyances not recorded. The principles of fraudulent conveyance of personalty without transfer of possession are to be applied except so far as notice to third persons has been given in acordance with the terms of the Federal statute.

* * * * * * * *

". . . Here the instrument itself lacks a sufficiency of description of the engines to meet any standard of fair notice to third persons dealing with the engines under the circumstances in which engines are used and maintained.

"We do not reach the question whether an artificer's lien can take precedence over a valid government lien, by way of mortgage, since the government lien on the engines is invalid as to third parties. Moreover, the case cited by the plaintiff, *U. S. v. Cardinale Warehousing Corporation et al.* (1946), 65 F. Supp. 760, would not be in point if the question of priority were before us. In that case there was no question but that the full title to the goods was in the United States. Liens on government property might well cripple the United States in carrying out *its* sovereign functions. No such danger is apparent in applying to the United States, as the holder of security for a debt, the same rules as to validity and priority of security as are applied to any citizen.

"Therefore, in a situation such as this, an artificer's lien may take precedence over a government lien invalid as to third parties."

The Government next contends that the California lien law is invalid since it is dependent on possession (G. 53). No cases are cited in support of this claim, and a similar claim was rejected by the court in *Davenport v. Grundy Motor Sales Co.,* 28 Cal. App. 409, 152 Pac. 932. There, plaintiff sold a car to X under a conditional sales con-

tract reserving title in the Seller. X left it with defendant who made repairs and asserted a lien under Vehicle Code, Section 3051, which provides: "a person who makes, alters or repairs any article of personal property, at the request of the owner, or legal possesor of the property, has a lien on the same for his reasonable charges for the balance due for such work done and materials furnished, and may retain possession of the same until the charges are paid." X defaulted and plaintiff sought to reclaim the car, contending that the statute was unconstitutional. Held, for defendant. One making repairs at the request of the legal possessor is protected by the statute.

In the aircraft lien law, the California legislature has simply declared that the registration certificate holder occupies the same status as the owner *for aircraft lien purposes.* If the legislature can constitutionally declare that a stranger to the title in the position of a legal possessor may occupy such status as in the *Davenport* case, it is difficult to see why it may not declare that the same stranger to the title in the position of the aircraft certificate holder may not.[42] This does no more than declare who is authorized to contract a lien.

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[42]Nor is there any conflict between the state aircraft lien law and federal law.

The federal law (49 U. S. C. A., Sec. 521(f)) provides:

"* * * Registration shall not be evidence of ownership in any proceeding in which such ownership by a particular person is, or may be, in issue."

The state law (Code Civ. Proc., Sec. 1208.62) provides in part: "*For the purpose of this chapter* the person named in the federal aircraft registration certificate issued by the Administrator of Civil Aeronautics shall be *deemed* the legal owner."

The chapter concerned is entitled "Liens on aircraft." It does not deal with *ownership* of aircraft, only with *liens.* A proceeding to declare and enforce a lien does not determine ownership, nor is ownership in issue.

F. International Has Prior Rights by Accession.

Apart from its claim of lien, International has rights by accession for the labor and materials bestowed by it on the aircraft. California Civil Code deals with acquisition of property, and modes by which property may be acquired. It recognizes that rights in property may be acquired by accession.[43] And this but declares established legal principles.

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[43]Sec. 1000: "Property is acquired by
1. Occupancy;
2. Accession;
3. Transfer;
4. Will; or,
5. Succession."

Sec. 1025: "When things belonging to different owners have been united so as to form a single thing, and cannot be separated without injury, the whole belongs to the owner of the thing which forms the principal part; who must, however, reimburse the value of the residue to the other owner, or surrender the whole to him."

Sec. 1026: "That part is to be deemed the principal to which the other has been united only for the use, ornament, or completion of the former, unless the latter is the more valuable, and has been united without the knowledge of its owner, who may, in the latter case, require it to be separated and returned to him, although some injury should result to the thing to which it has been united."

Sec. 1027: "If neither part can be considered the principal, within the rule prescribed by the last section, the more valuable, or, if the values are nearly equal, the more considerable in bulk, is to be deemed the principal part."

Sec. 1028: "If one makes a thing from materials belonging to another, the latter may claim the thing on reimbursing the value of the workmanship, unless the value of the workmanship exceeds the value of the materials, in which case the thing belongs to the maker, on reimbursing the value of the materials."

Sec. 1029: "Where one has made use of materials which in part belong to him and in part to another, in order to form a thing of a new description, without having destroyed any of the materials, but in such a way that they cannot be separated without inconvenience, the thing formed is common to both proprietors; in proportion, as respects the one, of the materials belonging to him, and as respects the other, of the materials belonging to him and the price of his workmanship."

In 1 American Jurisprudence, Accession, page 198, it is stated:

> "The doctrines of the civil law in regard to accession were incorporated by Bracton in his treatise on the laws of England, and its rules and directions blended with those of the common law. They have been recognized ever since as the doctrines of the common law, and therefore were transplanted into American jurisprudence with the stock on which they were ingrafted. The true object of the rule is, first, to protect owners whose rights or property are invaded, and second to screen an involuntary and casual trespasser, who has expended of his own in good faith, from punishment more severe that mere carelessness or honest error deserves."

And again (p. 207):

> ". . . When the right to the improved article is the point in issue, the question of how much the property or labor of each has contributed to make it what it is must always be one of first importance. It is, therefore, a test applied in some cases, that where it can be shown that the labor and materials of an innocent trespasser contributed more to the value of the present chattel than those materials which he took without intending a wrong, he is entitled to keep the chattel as his own, making, however, due compensation to the owner of the materials for what he took."

Thus in *Ochoa v. Rogers* (Tex. Civ. App., 1921), 234 S. W. 693, a plaintiff's stolen car fell into the hands of the Government, which sold it to defendant as junk for $85. Defendant converted it into a truck by expending $800, and plaintiff discovered and sought to reclaim it or its value, together with loss of use at $5 per day. Held,

for plaintiff for $85 only. "If one in wrongful possession be an innocent or unintentional trespasser, and in good faith enhances the value of the property, and such improvements exceed, or even substantially approach, the value of the article in its raw state when found, the property in dispute becomes merely accessory to the resulting product, and title thereto passes to the purchaser, who is liable to the original owner only for the market value of the lost article at the time it is found."

Even in respect to government property, an innocent accessor is protected. Thus in *E. B. Boles Wooden-Ware Co. v. United States,* 106 U. S. 432, defendant purchased timber in good faith from one who cut it in bad faith from government land and carried it to market. At cutting it was worth about $60, and at sale to defendant it was worth $850. Defendant added none of this increase in value. The court holds that Government could recover the entire value because of this circumstance, but states (p. 434):

> ". . . the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with the addition.
>
> * * * * * * * *
>
> ". . . If the case were one which concerned additional value placed upon the property by the work or labor of the defendant after he had purchased, the same rule might be applied as in the case of the inadvertent trespasser."

International's interest in the airplane, acquired as it was in the ordinary course of its business, and in good faith, should be protected. The Government's claim to the contrary (G. 53), that principles of accession do not apply as against it, is unsupported by any citation of authority.

Conclusion.

For each and all of the foregoing reasons, we submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

A. J. Blackman,

Attorney for Appellee International Airports, Inc.

APPENDIX A.

WAA-66

Calif. Certification Symbol
4-A-95

WAR ASSETS ADMINISTRATION
OFFICE OF AIRCRAFT DISPOSAL—EDUCATIONAL AIRCRAFT DISPOSAL DIVISION
WASHINGTON 25, D. C.

PURCHASE ORDER

Agreement No. 1 Order No. 101

Date June 25, 1946

Ship to VINELAND Elementary School District
(Full name of Institution)

Rt. 6 Box 207 Bakersfield, Calif. Peter A. Bancroft
(Number) (Street) (City) (State) (Signature)

Catalog No.	Quantity	Nomenclature	Type	Disposal Cost		Quantity Shipped	Date Shipped	
				Unit	Total			
-2420	1	C46 Curtis Commando		200.00	200.00			
-2220	1	P51C North Amer. Mustang		100.00	100.00			
-2620	1	AT6 North Amer. Texan		100.00	100.00			
					400.00			

U. S. GOVERNMENT PRINTING OFFICE 16—67980-1

Vineland's Exhibit D.

APPENDIX B.

-Ld 2

SALES RECEIPT

eived of ---- PETER BANCROFT ----------
(Purchaser or Authorized Representative)

purchases in name of ----- VINELAND SCHOOL DISTRICT -----
(Purchaser)

ROUTE 6, BOX 207, BAKERSFIELD, CALIFORNIA
(address)

sum of THREE HUNDRED DOLLARS AND NO CENTS ---------- $ 300.00

Cash ( ) Certified Check ( ) Cashier's Check (x) Bank Draft ( )

resenting payment (in full) (of balance) (down payment) on purchase

rice of $ 300.00 _____.

	(1) AT-6 (1) C-46		
ake	Service Model	Serv. Ident. No.	Mfg. Ser. No.

July 10, 1946

WAR ASSETS ADMINISTRATION

By R P Bates

R. P. BATES

International's Exhibit A-1.

APPENDIX C.

DEPARTMENT OF COMMERCE
CIVIL AERONAUTICS ADMINISTRATION

BILL OF SALE

s per agreement dated 28 February, 1951 consideration

R AND IN CONSIDERATION OF $ 10.00 and other good and valuable R OF THE FULL
GAL AND BENEFICIAL TITLE OF THE AIRCRAFT DESCRIBED AS FOLLOWS:

RCRAFT MAKE	SERIAL NO.	CAA REGISTRATION NO.
C-46 A	42-3645	111 M

ES THIS 28 DAY OF February 1951
REBY SELL, GRANT, TRANSFER, AND DELIVER ALL OF HIS RIGHT, TITLE, AND INTEREST IN AND TO SUCH AIR-
AFT UNTO:

ME OF PURCHASER Charles C. Finn
George C. Finn

545613

DRESS OF PURCHASER (Number, street, city, zone, and State)
6075 Franklin Ave., Hollywood, 28
California

D TO their EXECUTORS, ADMINISTRATORS, AND ASSIGNS, TO HAVE AND TO HOLD
GULARLY. THE SAID AIRCRAFT FOREVER. AND CERTIFIES THAT SAME IS NOT SUBJECT TO ANY MORTGAGE OR
HER ENCUMBRANCE EXCEPT:

PE OF ENCUMBRANCE	AMOUNT	DATE

FAVOR OF

TESTIMONY WHEREOF I HAVE S HAND AND SEAL
S 14 DAY OF April

ME OF SELLER
Vineland School District

(Signature to ink)
Edwin Bancroft Superintendent
LE (If signed on behalf of a Corporation or Partnership or if signed by an Agent)
Superintendent

CIVIL AERONAUTICS ADMINISTRATION
APR 16 2 06 PM '51
RECORDED
WASHINGTON, D.C.

ACKNOWLEDGMENT

TE OF California
UNTY OF Kern
THIS 14 DAY OF April 51
ORE ME PERSONALLY APPEARED THE ABOVE-NAMED SELLER, TO ME KNOWN
BE THE PERSON DESCRIBED IN AND WHO EXECUTED THE FOREGOING BILL OF
E, AND ACKNOWLEDGED THAT HE EXECUTED THE SAME AS HIS FREE ACT AND
D. GIVEN UNDER MY HAND AND OFFICIAL SEAL THE DAY AND YEAR ABOVE
ITTEN.

TARY PUBLIC MY COMMISSION EXPIRES
Irene M. Belanger
Seal

READ INSTRUCTIONS AT RIGHT CAREFULLY

My Commission Expires Nov. 30, 1953